

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS OF
PARENT ON BEHALF OF STUDENT

V.

BURBANK UNIFIED SCHOOL DISTRICT,
OAH CASE NUMBER 2018100167

AND

BURBANK UNIFIED SCHOOL DISTRICT

V.

PARENT ON BEHALF OF STUDENT.
OAH CASE NUMBER 2019040544

DECISION

On January 15, 2019, the Office of Administrative Hearings, referred to as OAH, deemed filed Student's first amended complaint in OAH case number 2018100167, referred to as Student's Case, naming Burbank Unified School District. On February 6, 2019, OAH continued the matter for good cause. On April 11, 2019, Burbank filed a Request for Due Process Hearing in OAH case number 2019040544, referred to as Burbank's Case, naming Student. On April 19, 2019, OAH granted the parties' Joint Motion to Consolidate. Student's Case was designated as the primary case for calculating the due date of a decision.

Administrative Law Judge June R. Lehrman heard this matter in Burbank, California, on May 14, 15, 16, 21, 22 and 23, 2019.

Attorneys Jane Dubovy and Mandy Favoloro represented Student. Mother attended the hearing on all days.

Attorney Lauri Arrowsmith represented Burbank. Director of Education Tamara Schiern or Special Education Coordinator Michael Concidine attended the hearing on all days.

At the parties' request, OAH granted a continuance for the parties to file written closing arguments and the record remained open until June 17, 2019. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

STUDENT'S ISSUES

1. Did Burbank deny Student a free appropriate public education by failing to conduct a functional behavior assessment from March 2018 through the filing of Student's first amended complaint on January 14, 2019?
2. Did Burbank deny Student a FAPE by failing to comply with all legal requirements regarding Burbank's March 2018 assessments in the area of speech and language, including augmentative and alternative communication?
3. Did Burbank deny Student a FAPE in the development of:
 - a. Student's individualized education program dated March 13, 2018, by:
 - i. Failing to:
 - (1) Consider the concerns of Parents for enhancing the education of Student;
 - (2) Consider the results of any outside assessments;
 - (3)
 - a. Include all required content, specifically, a sufficient statement of present levels of academic achievement and functional performance; measurable annual goals in any area of need; and special education and related services based upon peer reviewed research to the extent practicable (with the exception of physical therapy which is not in dispute); and

- b. Make a clear written offer of FAPE;
- (4)
 - a. Consider the use of positive behavioral interventions, supports, and strategies to address behaviors impeding Student's learning or that of others; and
 - b. Include a statement of the intervention, accommodation, or program modification Student requires to address such behaviors;
- (5) Include a statement of assistive technology devices or services Student required to receive a FAPE;
- (6) Consider whether the nature or severity of Student's disability was such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily; and
- (7) Consider the full continuum of placement options available, including placement in a typical preschool setting; and by
 - ii. Predetermining its offer of placement and services?
- b. Student's individualized education program dated June 6, 2018, by:
 - i. Failing to:
 - (1) Consider the concerns of Parents for enhancing the education of Student;
 - (2) Consider the results of any outside assessments;
 - (3)
 - a. Include all required content, specifically, a sufficient statement of present levels of academic achievement and functional performance; measurable annual goals in any area of need; and special education and related services based upon peer reviewed research to the extent practicable (with the exception of physical therapy which is not in dispute); and
 - b. Make a clear written offer of FAPE;
- (4)

- a. Consider the use of positive behavioral interventions, supports, and strategies to address behaviors impeding Student's learning or that of others and
 - b. Include a statement of the intervention, accommodation, or program modification Student requires to address such behaviors;
- (5) Include a statement of assistive technology devices or services Student required to receive a FAPE;
- (6) Consider whether the nature or severity of Student's disability was such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily; and
- (7) Consider the full continuum of placement options available, including placement in a typical preschool setting; and by
- ii. Predetermining its offer of placement and services?
- c. Student's individualized education program dated January 10, 2019, by:
- i. Failing to:
 - (1) Consider the concerns of Parents for enhancing the education of Student;
 - (2) Consider the results of any outside assessments;
 - (3)
 - a. Include all required content, specifically, a sufficient statement of present levels of academic achievement and functional performance; measurable annual goals in any area of need; and special education and related services based upon peer reviewed research to the extent practicable (with the exception of physical therapy which is not in dispute); and
 - b. Make a clear written offer of FAPE;
- (4)
- a. Consider the use of positive behavioral interventions, supports, and strategies to address behaviors impeding Student's learning or that of others; and

- b. Include a statement of the intervention, accommodation, or program modification Student requires to address such behaviors;
- (5) Include a statement of assistive technology devices or services Student required to receive a FAPE;
- (6) Consider whether the nature or severity of Student's disability was such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily; and
- (7) Consider the full continuum of placement options available, including placement in a typical preschool setting; and by
 - ii. Predetermining its offer of placement and services?
- 4. Did Burbank deny Student a FAPE by failing to provide legally compliant prior written notice after his IEP dated:
 - a. March 13, 2018, regarding Burbank's refusal to offer:
 - i. Placement in a general education setting with supplementary aids and services;
 - ii. Applied behavioral analysis interventions consisting of a one-to-one aide for the full school day and direct one-to-one intervention outside the school day for 30 hours per week; and
 - iii. Related services in the frequency and duration recommended by private experts and requested by Parents in the areas of speech and language and occupational therapy?
 - b. June 6, 2018, regarding Burbank's refusal to offer:
 - i. Placement in a general education setting with supplementary aids and services;
 - ii. Applied behavioral analysis interventions consisting of a one-to-one aide for the full school day and direct one-to-one intervention outside the school day

- for 30 hours per week; and
- iii. Related services in the frequency and duration recommended by private experts and requested by Parents in the areas of speech and language and occupational therapy?
- c. January 10, 2019, regarding Burbank's refusal to offer:
 - i. Placement in a general education setting with supplementary aids and services;
 - ii. Applied behavioral analysis interventions consisting of a one-to-one aide for the full school day and direct one-to-one intervention outside the school day for 30 hours per week; and
 - iii. Related services in the frequency and duration recommended by private experts and requested by Parents in the areas of speech and language and occupational therapy?
- 5. Did Burbank deny Student a FAPE in his IEP dated
 - a. March 13, 2018 by failing to offer appropriate:
 - i. Annual goals in all areas of need (with the exception of physical therapy which is not in dispute);
 - ii. Behavior plans;
 - iii. Related services in
 - (1) Speech and language;
 - (2) Occupational therapy; and
 - (3) Applied behavior analysis including a one-to-one aide for the full school day and direct one-to-one intervention outside the school day for 30 hours per week;
 - iv. Placement in a typical general education preschool setting with a small class size, small student to teacher ratio, structured educational programming, and

- typically developing peer role models; and
- v. Placement in a typical general education preschool setting with related services in speech and language, occupational therapy, and applied behavior analysis consisting of a one-to-one aide for the full school day and direct one-to-one intervention outside the school day for 30 hours per week for the extended school year and continuing weeks of service without breaks to prevent regression?
- b. June 6, 2018, by failing to offer appropriate:
- i. Annual goals in all areas of need (with the exception of physical therapy which is not in dispute);
 - ii. Behavior plans;
 - iii. Related services in
 - (1) Speech and language;
 - (2) Occupational therapy; and
 - (3) Applied behavior analysis including a one-to-one aide for the full school day and direct one-to-one intervention outside the school day for 30 hours per week;
 - iv. Placement in a typical general education preschool setting with a small class size, small student to teacher ratio, structured educational programming, and typically developing peer role models; and
 - v. Placement in a typical general education preschool setting with related services in speech and language, occupational therapy, and applied behavior analysis consisting of a one-to-one aide for the full school day and direct one-to-one intervention outside the school day for 30 hours per week for the extended school year and continuing weeks of service without breaks to prevent regression?

- c. January 10, 2019, by failing to offer appropriate:
 - i. Annual goals in all areas of need (with the exception of physical therapy which is not in dispute);
 - ii. Behavior plans;
 - iii. Related services in
 - (1) Speech and language;
 - (2) Occupational therapy; and
 - (3) Applied behavior analysis including a one-to-one aide for the full school day and direct one-to-one intervention outside the school day for 30 hours per week;
 - iv. Placement in a typical general education preschool setting with a small class size, small student to teacher ratio, structured educational programming, and typically developing peer role models; and
 - v. Placement in a typical general education preschool setting with related services in speech and language, occupational therapy, and applied behavior analysis consisting of a one-to-one aide for the full school day and direct one-to-one intervention outside the school day for 30 hours per week for the extended school year and continuing weeks of service without breaks to prevent regression?

6. Burbank's Issue

Did Burbank's February 14, 2019 IEP offer Student a FAPE (with the exception of physical therapy which is not in dispute)?

The ALJ has renumbered, reworded and clarified some issues stated in the prehearing conference statement as allowed by the holdings in *J.W. v. Fresno Unified School District* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified*

School District (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High School District* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) No change in substance has been made. The issues also incorporate stipulated amendments to the issues the parties made during the hearing.

SUMMARY OF DECISION

For three IEPs, in March and June 2018 and January 2019, Student contends Burbank denied him a FAPE by failing to conduct a functional behavior assessment, failing to appropriately assess for speech and augmentative and alternative communication, failing to consider information provided by Parents including outside assessments, failing to include required content, failing to make clear written offers, predetermining its offer of placement and services, failing to provide proper prior written notice, failing to offer appropriate goals, behavior plans, and related services in speech, occupational therapy, and behavior, failing to provide a general education placement in the least restrictive environment, and failing to offer appropriate extended school year services.

Student prevailed on a number of these issues, specifically that Burbank failed between the June 2018 and the January 2019 IEPs to consider an outside assessment that had been prepared by a partial hospitalization program at University of California, Los Angeles, commonly called UCLA. Mother provided the assessment to Burbank in June 2018, but the evidence established it was never considered. Student also prevailed on his claim that Burbank denied him a FAPE by failing in March, June, and January to state clear written offers of placement and services. Student also prevailed on his claim of predetermination, specifically with regard to the offers of extended school year services, which were not individualized to Student's needs. Burbank also failed to offer appropriate behavior goals, behavior plans, and related services in speech.

Student did not prevail on his claims that general education was the least

restrictive environment for him, nor that he required full time one-to-one aide services.

For its February 14, 2019 individualized education program offer, Burbank contended it offered Student a FAPE in the least restrictive environment. Burbank did not prevail on this claim. The February 2019 IEP suffered from the same defects as the prior IEPs. The offers were unclear, extended school year services were predetermined, there was no behavior goal or behavior plan, and the offer of related services in speech was insufficient. Because Burbank did not offer a FAPE, Parents are entitled to reimbursement for the private program they provided. Burbank is ordered to convene an IEP team meeting to reconsider its offer of FAPE, in light of the findings made in this Decision.

FACTUAL FINDINGS

Student was born on March 27, 2015, and was four years old at the time of the hearing. In December 2016, Student qualified for regional center services and had an individualized family service plan for overall developmental delays. Through his third birthday, Student received a program and services provided by the Frank D. Lanterman Regional Center through the California Early Start Program. Early Start is another name for the California Early Intervention Services Act (Gov. Code, § 95000 et seq.). An infant or toddler under three years of age is eligible if the child demonstrates a developmental delay. (Gov. Code, § 95014, subd. (a); 20 U.S.C § 1432(1); see also Cal. Code Regs., tit. 17, § 52020.) The Department of Developmental Services delivers Early Start services through regional centers. (Gov. Code, § 95004; Welf. & Inst. Code, § 4620.) California Code of Regulations, title 17, section 52112 prescribes a process for a transition from Early Start to special education services as an eligible child approaches the age of three.

JULY 2017

B.I.G. Solutions, a private provider of applied behavior analysis services,

conducted an initial assessment of Student in July 2017, when he was two years and three months old. B.I.G. generated goals, a treatment plan, and a behavior plan. At the time of B.I.G.'s initial assessment, Student was not yet in preschool. At that time, he was not speaking, not engaging with others, nor with the world around him. He was unable to sit still for even a couple of seconds. He exhibited very fleeting eye contact, stared, spun in circles, did not attend to his environment, was nonverbal, and had almost no communication system. His adaptive behavior was below the first percentile with motor skills in the second percentile. His verbal behavior development was under the 18-month level, with some higher splinter skills. However, according to B.I.G.'s clinical director Jennifer Sotodeh, he was not at that time exhibiting extreme maladaptive behaviors. The maladaptive behaviors domain was assessed using an instrument called the Verbal Behavior Milestones Assessment and Placement Program, an instrument that was appropriate for Student's age range under three years old.

B.I.G. recommended 27 goals in skill areas that would be necessary to attend school, including sitting still, making eye contact, tracking objects, appropriate eating, imitation skills which are the basis of all learning, matching shapes, items, and colors, labelling, and developing a communication system. B.I.G. recommended 30 hours per week of direct individual one-to-one aide services, plus four hours per week of supervision and one hour of parent training. Ms. Sotodeh believed all 27 goals were appropriate and educationally related, based on B.I.G.'s evidence-based assessment. The evidence did not establish that Burbank was ever given a copy of B.I.G.'s July 2017 initial assessment.

B.I.G. provided the recommended services to Student through the date of hearing. The costs were borne by Parents' insurance, with the exception of three days on January 2-4, 2019, for which Parents paid \$187.00

2017-2018 SCHOOL YEAR

When he was two and a half years old, Student began attending a private general education preschool, Disney Children's Center, in September or October of 2017. There were no more than 12 students and three or four adults, in addition to the B.I.G. aide in the classroom. Student required more one-to-one attention than the three to four adults in the classroom would normally be able to provide. B.I.G.'s aide attended with him.

Disney preschool teacher, M. Lauren McNulty, testified at hearing. Student attended her class during the 2017-2018 school year except for the time frame from February through May 2018. Ms. McNulty had over 30 years' experience as a preschool teacher, 15 of which were in California. However, she had virtually no experience teaching children with special needs. She had never taught special education. She had only observed perhaps five special education special day classes over the last 15 years. She was unfamiliar with the term "maladaptive behaviors." She worked only with nine or 10 autistic children over her whole career. She had no specific training in educating children with autism, except some classes in college and graduate school. She had no training in applied behavior analysis. Her opinions, stated at hearing, concerning the appropriateness of special education versus general education, were unpersuasive and given no weight, due to her unfamiliarity with special education in general. Specifically, she testified that mainstreaming is in her opinion always appropriate for all children, except the most severely orthopedically impaired.

Prior to February 2018, Student could take only some instruction from Ms. McNulty without one-to-one prompting by his aide. He followed along with the group; he took his shoes off and put them on; he saw and heard instructions but was unable to follow through without his aide to accomplish them. However, Ms. McNulty felt Student benefitted from being with typical children.

Student was using assistive technology in Ms. McNulty's classroom prior to February 2018. He used picture icons and an iPad, on which she received training from Parents and the one-to-one aide. However, in and prior to February 2018, Burbank was not aware of Student's use of assistive technology.

B.I.G. provided periodic updates on Student's progress. In November 2018, they added new goals specifically geared toward the preschool setting.

NOVEMBER 2017

In November and December 2017, Lanterman Regional Center began the process of referring Student to Burbank for special education and related services. Burbank and Mother corresponded. On November 18, 2017, Mother wrote a letter requesting assessment. In that letter and subsequent questionnaires, Mother advised Burbank that Student had been diagnosed with moderate autism, receptive and expressive speech delay, and feeding disorder of childhood. Mother stated her concerns that Student was nonverbal, only understood a very limited number of words, did not follow commands, had low muscle tone and a tendency to trip when walking, was not able to jump or kick, lacked social skills, did not interact well with others, ran away from other children, had a need for excessive personal space, showed no interest in toileting, only ate soft textured foods, and did not have any perception of danger. He would run into oncoming traffic if allowed. Mother also advised Burbank that Student was at that time attending the Disney Children's Center preschool with a one-to-one applied behavior analysis therapist, and received speech therapy three times a week in-clinic. Mother also described being in the process of finding a new occupational therapist for sensory and feeding issues, for twice weekly services. Mother expressed her concerns about Student's academic achievement, speech and language skills, and social-emotional development. Mother stated Student exhibited defiance, distractibility, and had a short attention span.

Burbank generated an assessment plan dated December 4, 2017, to which Parents consented on December 10, 2017. The assessment plan proposed to assess Student in academic and general knowledge, health, intellectual development, language and speech, motor development, social-emotional functioning and behavior, and adaptive behavior. Burbank did not propose to conduct a functional behavioral assessment or an assessment for assistive technology or augmentative and alternative communication. On December 18, 2017, Burbank sent notice of a scheduled assessment on February 20, 2017.

JANUARY 2018

On January 15, 2018, Parents obtained a Developmental Assessment from assessor Marta Schmidt-Mendez, dated January 15, 2018. Ms. Schmidt-Mendez's assessment report reflected that Student had a cognitive developmental age of 23 months, a receptive communication developmental age of 11 months, an expressive communication developmental age of 14 months, and a personal/social developmental age of 16 months. The report indicated Student required close supervision because he had a tendency to bolt.

After two months of Student's attending Disney with an aide, on January 31, 2018, B.I.G. re-administered adaptive and verbal skills assessments and reported on Student's progress. B.I.G.'s January 31, 2018 report reflected that Student was making progress on all 27 of his goals and had met some of them. B.I.G. re-administered adaptive functioning instruments and compared the results to the previous July's. Student's adaptive behavior had improved. His verbal behavior development had progressed from July 2017 when he was under the 18-month level, with some higher splinter skills. In January 2018 he was scoring for the most part in the 24-month range. He had started communicating his basic wants and needs through a communication system that included gestures, pictures and icons, and some verbal output. B.I.G.'s assessment

in January 2018 showed Student exhibited fewer behavior problems in January 2018 than he had shown initially in July 2017 when, according to the prior report, he was not exhibiting significant or extreme maladaptive behaviors at all. The sole exception noted in January 2018 was the behavior of putting inedible objects in his mouth. However, he still scored below the first percentile in the realms of communication, daily living skills, and socialization.

FEBRUARY 2018

On or around February 15, 2018, Mother got notice from the Early Childhood Partial Hospitalization Program at University of California, Los Angeles that there might be a spot available for Student. The Early Childhood Partial Hospitalization Program was an intensive, short-term, twelve-week, multidisciplinary program of assessments and treatment for young children either on the autism spectrum or with other developmental disabilities. The admissions process would have taken an unspecified amount of time prior to the admission date. The program required prior certification by a child psychiatrist, and insurance approval as it was a partial hospitalization program. There was a wait-list that could take up to two years.

On the morning of February 20, 2018, the same day that Burbank's assessment was scheduled, Mother received insurance authorization for Student to attend the partial hospitalization program.

BURBANK'S FEBRUARY 20, 2018 ASSESSMENT

On February 20, 2018, Burbank initially assessed Student for eligibility for special education and related services. Mother and Student attended the scheduled assessment. Burbank requested and Mother granted permission to receive information from Disney, which Student was attending at that time. Also, on or shortly after February 20, 2018, Mother informed Burbank that Student was about to enroll into the partial

hospitalization program at UCLA.

Burbank school psychologist Natasha Chaja, speech and language pathologist Jezelle Riven, occupational therapist Jennifer Anderson, and special education teacher Anjanette Michalopoulos conducted Burbank's initial preschool assessment of Student. Burbank was aware at the time that Lanterman Regional Center had provided early intervention services since January 2017 in the areas of speech, occupational, and physical therapies. Burbank was aware of Student's diagnoses of autism, expressive language delay, and feeding disorder by the Boone Fetter Clinic in June 2017. Burbank was aware that Student had been attending Disney. Burbank was aware he received speech therapy three times a week and occupational therapy two times a week, and applied behavioral analysis therapy for four hours each day. Burbank was aware Student had just become eligible for the UCLA partial hospitalization program.

Mother reported to Burbank assessors her concerns with Student's speech development. She reported concerns with his behavior. More specifically, she reported his difficulty following directions, short attention span, constant movement, putting things in his mouth, and self-stimulatory behaviors such as spinning in place.

Burbank was in possession at the time of its assessment of the following outside reports:

- a Diagnostic and Clinical Assessment report from the Boon Fetter Clinic dated June 30, 2017 that reflected low adaptive scores, clinically significant affective and anxiety problems, and below average cognition;
- B.I.G. Solutions' January 31, 2018 Progress Report;
- a previous speech and language Assessment from November 8, 2016; and
- a speech progress report from February 2018 reporting improvement in receptive language skills and slow progress towards improving expressive language.

The evidence did not establish that any other outside reports were in Burbank's possession at the time.

School psychologist Ms. Chaja credibly defended her review of the outside reports of which Burbank was in possession at the time, including the B.I.G. Solutions January 31, 2018 progress report. She was aware Student received applied behavior analysis therapy at Disney. She was aware of B.I.G's reported progress on goals. At hearing, she credibly reported what she recalled about the outside assessments' results. Ms. Chaja very persuasively defended her decisions, in her own assessment report. She explained which of the outside assessment results she chose to include or not include, and the reasons why, including their lack of contemporaneousness, her own current administration of more current results, and her reasonable desire to observe Student's own current abilities rather than rely on prior reporting by third persons. She also non-defensively acknowledged that some of Student's speech and adaptive functioning had progressed over time, thereby acknowledging that Student had made progress in the program Parents had been providing to him.

Speech and language pathologist Ms. Riven, at hearing, could not recall precisely which reports she had reviewed, and she acknowledged the possibility that she did not list each and every one in her assessment report. She acknowledged what she could not remember, and remained non-defensive and unruffled on examination and cross-examination on this topic.

Ms. Chaja administered standardized assessments to assess Student's cognitive and adaptive functioning. The Southern California Ordinal Scales of Development was the cognitive instrument she chose. It was a play-based assessment that used direct observation as well as rating scales, and did not require that a student be verbal. She administered only the portions of the assessment applicable to the 18-24-month age range. She knew Student would be unsuccessful at the two- to four-year age range

portions. Student did not have much language and was unsuccessful following directions. Ms. Chaja steered away from any higher level or more structured cognitive testing instruments, finding they would have not been appropriate for Student. Her estimate of Students' cognitive level was that he was then at the 12- to 18-month level. At hearing, she acknowledged that this could have been an under-estimate given Student's autism and his lack of verbal ability. But, even so, his level at that time would not have been higher than the 18 to 24 month level. Her results were consistent with the outside Boone Fetter assessment that she had reviewed, which had scored him below average in the 19-month age range using a different instrument.

Ms. Chaja assessed Student's adaptive behavior using the Vineland Adaptive Behavior Scales, Second Edition. Ms. Chaja credibly defended her decision to administer the Vineland questionnaire only to Mother and not to any of Student's then current teachers, given his very recent transition from Disney to UCLA. Mother's ratings of Student's overall adaptive behavior fell within the low range. Mother reported Student did not yet understand the meaning of "yes," and was not yet able to identify at least three major body parts. He was sometimes able to wave, and sometimes able to call her by name. He did not yet name at least three objects or try to answer a question. He did not yet drink from an open cup or indicate when he was soiled. Mother reported Student demonstrated no safety awareness. He did not yet imitate other's facial expressions, show interest in children his age, choose to play with other children, or say "thank you" when given something.

Ms. Chaja did not perform a functional behavioral assessment at the time of the initial assessment. At hearing, she credibly and consistently defended her decision not to do so. In her opinion, a functional behavioral assessment must be conducted in the environment in which a student is to be placed, such that one can see the predictors of certain behaviors.

Ms. Chaja appeared on the witness stand as a dedicated, engaged, energetic, well-credentialed, responsible, and intelligent professional, as did the other assessors Ms. Riven, Ms. Anderson, and Ms. Michalopoulos.

Ms. Chaja did not develop a behavior support plan for Student. She was accustomed to developing behavior plans when appropriate for students in Burbank's Special Education Early Development program, a special day class program for preschool-age students eligible for special education and related services. At hearing, her examples for when a behavior plan might be appropriate were aggression, profanity, and safety concerns.

Ms. Chaja used the Gilliam Autism Rating Scale, Third Edition to evaluate the likelihood that Student had autism based on the severity of his behaviors characteristic of autism. Student rated as very likely for autism spectrum disorder, requiring very substantial support. She found Student to exhibit significant restricted, repetitive behaviors and difficulties with social interaction, communication, and emotional responses. He did not initiate conversations, follow others' cues to look at something, try to make friends, or engage in imaginative play.

Ms. Riven assessed Student's speech and language functioning. Ms. Riven was either unaware at the time of her assessment, or at hearing could not recall what level of speech/language services Student had been receiving from his then-current providers. She could not recall what outside reports she had reviewed or whether she listed them all. Thus, it was not clear whether or not she had focused on the Boone Fetter Clinic June 2017 assessment, which had recommended two hours per week of speech therapy. At some point in time she learned he was receiving three weekly sessions of 30 minutes each, but she could not recall when she learned that.

Ms. Riven attempted a language sample analysis, but Student was nonverbal so she could not take a language sample. When a student was nonverbal, she used

nonverbal play-based skill assessments to see if the student understood directions and could imitate actions. Ms. Riven attempted standardized testing of Student but her report did not reflect which standardized testing she attempted. Her report simply indicated, as did her testimony at hearing, that standardized scores could not be reported because Student was nonverbal. In response to questioning as to various assessment tools available to use, she consistently responded that none were appropriate because Student was not speaking at all, was not attentive, and could not follow instructions.

She conducted an Oral Peripheral Examination and found Student's oral structures and musculature appeared adequate to produce intelligible speech. What she meant by "adequate" was that she observed his ability to move his lips and mouth. But, she did not observe him producing words.

She reflected Mother's reporting that Student responded to his name approximately 15 to 20 percent of the time, did not yet follow one-step commands, did not understand the concept of "no", but did respond to tone of voice telling him to stop an activity. He occasionally labelled some body parts.

Student's receptive understanding was in the nine- to 12month age range. Expressively, his skills were in the six to nine month age range with some skills inconsistently exhibited in the nine to 12 month age range. Student's expressive language was characterized by emerging signs, gestures, and jargon, babbling and sound approximations. In the area of pragmatics or social skills, Student did not yet play with toys appropriately. He did parallel play with familiar peers. He demonstrated the use of eye contact approximately 25 percent of the time. He was not interested in peers.

Overall Ms. Riven's impression of Student was that he was in the lower 25 percent of all children she had assessed in terms of his expressive language, and in the bottom half of all children she had assessed in his receptive skills.

She did not use any alternative voice output device for her assessment, although she had experience with augmentative and alternative communication to assess whether a nonverbal student had a language system. Student and Parent brought no assistive technology devices with them to the Burbank assessment and did not mention it to Burbank assessors. Burbank was, however, in possession of the B.I.G. January 31, 2018 progress report, which noted that Student used a communication system that included gestures, pictures, icons, and some verbal output.

Student's pre-academic and academic skills were assessed by special education teacher Angie Michalopoulos, based on observations, scales, and parent input. Student demonstrated an extremely short attention span of only 20 to 30 seconds. He did not yet follow one-step directions. He was unable to participate in the structured part of the assessment. He did not point to pictures in a book, body parts, or named objects. Pre-vocational and vocational skills were reported by Ms. Michalopoulos, based on observations and parent input.

Occupational therapist Jennifer Anderson attempted to administer a standardized test, the Peabody Developmental Motor Scales, Second Edition, to measure Student's motor abilities. Due to his inconsistent attention to adult-directed activities and unwillingness to complete specific tasks, a score was not obtained and the test was discontinued. Ms. Anderson used the Sensory Processing Measure - Preschool home form to obtain information from Mother about the way Student perceived sensory information. The Sensory Processing Measure was a standardized questionnaire based on parent and teacher perceptions of the child across multiple settings. It assessed overall sensory processing in children aged two to five by using an integrated system of rating scales that identified sensory processing difficulties based on eight different functional areas. Student scored in the "Definite Dysfunction" and "Some Problems" ranges on many areas on the parent-completed form. Student demonstrated over-

responsiveness to touch input, with the exception of an under-responsiveness to pain, and over-responsiveness to vestibular, auditory, and visual inputs. Student had challenges with sensory modulation and the perception of visual, proprioceptive, and vestibular input and postural control. Student demonstrated a very short attention span, which impacted his ability to visually attend to visual motor tasks.

The assessors recommended a small structured environment, with embedded behavioral supports, speech and language services, and occupational and physical therapy services to be determined by the IEP team.

Burbank generated an assessment report dated March 2, 2018. Burbank had not yet observed Student either at Disney or at UCLA. Ms. Chaja explained that Burbank generally waited to meet the parents first before scheduling observations, thus they did not observe Student at Disney prior to February 20, 2018. And, at the time of the February 20, 2018 assessment, Student was transitioning from Disney to UCLA but had not yet attended UCLA. Ms. Chaja, at hearing, credibly defended the fact that Burbank did not include observation of Student's then-current program, which was in flux, in its assessment. It would not have been reasonable for Burbank to observe Student at Disney before the assessors' first meeting with Mother. Nor would it have been reasonable for Burbank to delay its assessment, which had been scheduled since December, to conduct an observation in Student's new program at UCLA. Moreover, Student was not yet three years old, and the assessment was timely scheduled for February 20, 2018, one month before his third birthday.

FEBRUARY 21-22, 2018 UCLA ASSESSMENT AND ADMISSION

Student enrolled at UCLA on or around February 22, 2018.

Tanya Paparella, clinical psychologist and Director of the UCLA Early Childhood Partial Hospitalization Program, testified at hearing. The partial hospitalization program

worked with children and parents to develop ongoing treatment program recommendations for after a child was discharged. It treated 18 to 20 children at any given time. Children were grouped by age range, such that one class contained two- to three-year olds, which was the class in which Student was placed. Another class served three- to four-year olds, and two classes served four- to six-year olds, with one class specifically geared towards nonverbal or minimally verbal children. There were no typically developing children in the UCLA program.

Upon admission, Student was assessed by the UCLA team on or around February 21, 2018, the day after Burbank's assessments.

His cognitive skills were assessed using the Mullen Scales of Early Learning, which yielded age-equivalent scores in four domains. In visual reception, Student scored at the age equivalency of 21 months. In fine motor, Student scored at the age equivalency of 22 months. In receptive language, Student scored at the age equivalency of under 12 months. In expressive language, Student scored at the age equivalency of under 12 months. These results were not significantly disparate from Ms. Chaja's cognitive assessments, which had found Student's cognitive level to be at the 12- to 18-month level.

UCLA occupational therapist Brandy Saccacio conducted clinical observations. Like Burbank's occupational therapist Ms. Anderson, Ms. Saccacio attempted standardized testing but was unable to complete tests in a standardized manner due to Student's poor comprehension and attention to tasks. Her non-standardized scoring rated Student having an age equivalency to 26 months in his fine motor skills and 19 months in his gross motor skills. Ms. Saccacio also relied on observations and questionnaires, as did Ms. Anderson. Ms. Saccacio also used the Sensory Processing Measure. Ms. Saccacio determined, as had Ms. Anderson, that Student scored in the "Definite Dysfunction" and "Some Problems" ranges on many areas on the completed

forms.

UCLA speech and language pathologist Sarah Gross administered an oral peripheral examination, the Preschool Language Scale, fifth edition, and took a language sample. The Preschool Language Scale was a directly administered test that provided a standardized score for receptive and expressive language. Student scored in the lowest percentile rank. Student's scores placed him in the below 12-month age range on both portions. He did not have an age-appropriate inventory of sounds. He was not exhibiting consistent imitation skills. He scored in the lowest percentile ranks for expressive and receptive vocabulary. He had some sounds, and did fill in some phrases. His sounds were sometimes paired with meaning, and sometimes not. He had no consistent communication system. Ms. Gross assessed the structure and function of Student's lips, jaw, and tongue. Like Burbank's assessment, Ms. Gross found that vocal quality, fluency, and resonance could not be assessed at that time.

Like Burbank's assessment, Ms. Gross found that a speech sample could not be collected because Student made fewer than 50 utterances. However, unlike Burbank's assessor, Ms. Gross went further, taking an inventory of speech sounds. Student demonstrated the ability to produce certain consonants and vowels, which Ms. Gross listed in detail. Student was not consistently able to produce the accurate sound despite watching the therapist's production.

Ms. Gross was able to perform a language sample to further assess Student's receptive, expressive, and pragmatic language skills. He independently followed the direction "sit down," and required prompting to follow directions such as "stand up," "give," "clean up;" or "put in." During play, he consistently identified letters when presented in a field of two or three, and inconsistently identified familiar items in a field of two, such as an elephant, lion, or giraffe. He did not identify body parts on himself or a doll. Student made occasional vocalizations, sometimes with communicative intent.

Ms. Gross summarized her findings as a severe communication disorder characterized by delays in receptive, expressive, and pragmatic language development. Student did not have a functional communication system, and he had limited understanding of age-appropriate vocabulary. He had limited joint attention, fleeting eye contact, and difficulty sustaining engagement. Ms. Gross did not diagnose Student with apraxia, which concerns the brain's production of speech and language; she was unable to do so because she was unable to collect more than 50 utterances. This was similar to Burbank's assessment, except that Ms. Gross noted the possibility of apraxia and recommended that it be ruled out, whereas Burbank's assessment did not note this as a possible concern.

At the time of Student's entry into the partial hospitalization program on or around February 22, 2018, UCLA did not assess him for assistive technology or augmentative and alternative communication. Nor did UCLA immediately conduct a functional behavioral assessment. These types of assessments were, however, conducted by UCLA during Student's attendance and are discussed chronologically below.

The UCLA team developed treatment objectives and a treatment plan based on their assessments. With certain exceptions noted below, the evidence did not establish what specific goals UCLA was working on nor the level of related services they provided. This information, as to specific goals and services during the 12-week program, was not reflected in the discharge report that UCLA ultimately compiled. At hearing, it was established that during Student's stay at UCLA, Ms. Gross worked with him three times a week for 30 minutes individually in her pull-out speech therapy room.

Student's partial hospitalization program class was structured into play time, morning circle time, one-to-one direct instruction, and related services to work on treatment goals. There were bathroom and snack breaks, more direct instruction, recess and play, and more treatment sessions. Then students ate lunch, participated in group

activities, and closing circle time. The UCLA daily program went from 8:00 AM to 1:45 PM five days a week. The program provided applied behavior analysis interventions but without Student's one-to-one aide, who did not attend the program.

UCLA's social skills teaching curriculum included direct instruction, milieu-based dyadic interaction, and structured social teaching sessions. UCLA structured every aspect of Student's social interactions. To encourage him to wave "hi and bye," every therapist greeted him at the beginning of direct instruction sessions, and bid farewell at the end of his sessions. Adults entering the classroom throughout the day initiated greetings and farewells. Therapists taught him to make eye contact when his name was called. All adult interactions were initiated and sustained by the therapists. Student displayed minimal to moderate awareness of adults. He inconsistently made eye contact during these interactions and required physical prompting to respond to adults. He was inconsistently responsive to one-to-one interactions. He rarely imitated the therapist's actions. To develop his social relatedness and engagement with adults, UCLA initiated frequent social games and songs throughout the day. They began with one-to-one games only between Student and one adult. They then introduced exchanges that involved Student, a teacher, and an object. They exposed Student to multiple adults and teachers within the clinic to generalize social relatedness. His adult interactions drastically improved during his time in the program.

In terms of his peer interactions, when Student first began the program, he displayed little to no desire to interact with his peers. Student rarely responded to peers' greetings and required full physical and verbal prompts to respond to these interactions. Student spent most of his time in solitary play, and when peers were nearby he moved away from them or turned his back to them. He often cried in response to other children crying or engaging in loud vocalizations. UCLA initially aimed to introduce parallel play, and they initiated Student's interactions with peers. Therapists encouraged Student to

say "hi" and "bye" to peers throughout the day with eye contact. The overall quality of Student's peer interactions in both structured and unstructured settings improved. Student became more aware of his peers in the classroom and noticed his peers when they entered the classroom. He still required gestural and physical prompts to engage in and sustain parallel play with peers.

To participate in groups, Student required maximum physical assistance and prompting to transition to group activities. He required maximum prompting to attend to the leader of the group. He showed neutral affect, poor eye contact, and required physical prompts to imitate actions of the lead therapist during songs. Over his time at UCLA, he required less physical assistance to transition to group activities such as circle time.

Mother observed Student over the 12 weeks become more tolerant of peers. He made some vocal utterances, recognized some sounds, touched peers, and became less fearful of the play structure. Student seemed to blossom, exhibited fewer behaviors, and became calmer.

MARCH 6 THROUGH 13, 2018

On March 6, 2018, Burbank requested and received Mother's permission to speak to Disney teacher Ms. McNulty. Ms. Chaja interviewed Ms. McNulty on March 7, 2018. Ms. McNulty reported that Student was compliant. Although he sometimes fussed, he easily moved on for transitions and worked with different adults. She reported Student was able to attend longer to activities with his additional one-to-one adult support, such as circle time. She reported he did not engage in interactions with peers, as it was more parallel play.

A few weeks into the UCLA program, approximately the first week of March 2018, Ms. Gross assessed Student to determine an appropriate augmentative and alternative communication device to facilitate expressive language skills and supplement verbal

speech. Because Student's speech production skills were not yet developed, Ms. Gross felt a voice output device would be beneficial. She probed the use of an iPad, using various icons and applications. She determined that Proloquo2Go was the most appropriate application for Student. A voice output device was selected rather than a picture exchange system, to provide a verbal model. Over the course of his 12 weeks in the UCLA program, Student's device had a display of icons, with vocabulary divided by category. A limited set of vocabulary words were targeted to ensure frequent opportunities for practice. Ms. Gross opined that during his stay at UCLA, Student "thrived" using the augmentative and alternative communication device. Because of the transitional circumstances at the time, Burbank was not contemporaneously aware of the augmentative and alternative communication assessment or trials that UCLA performed.

At or around this same time, when Student began attending the UCLA program, UCLA conducted a functional analysis of behavior to determine his interfering behaviors and their functions. UCLA did not assess Student's functional behaviors before he attended their program. The behaviors, intervention plans, and progress UCLA assessed were specific to the partial hospitalization program's classroom and therapy sessions.

The functional behavior assessment investigated three interfering behaviors: noncompliance, and oral and visual stereotypy. In terms of his noncompliance, Student cried, refused prompts, flopped to the floor, and/or attempted to elope. The function of these behaviors was for escape. The initial frequency of noncompliance was 31 times per clinical day. Oral stereotypy was placing inedible items such as objects, fingers, and clothing in his mouth. The function of placing items in his mouth was for reinforcement. The initial frequency of this behavior was 10 times per clinical day. Visual stereotypy was scrutinizing objects close to his face. The initial frequency of this behavior was 36 times per clinical day. Burbank was not aware of the functional behavior assessment at the

time it occurred.

UCLA developed interventions to address the three interfering behaviors. The UCLA discharge report, described in further detail below, stated that the interventions were "specific to the [partial hospitalization program] classroom and therapy sessions."

MARCH 13, 2018 IEP

The initial IEP team meeting occurred on March 13, 2018. Mother, Father, a regional center representative, and B.I.G.'s director Ms. Sotodeh attended. Burbank assessors all attended as well. Student had been attending the UCLA program approximately two to three weeks. Burbank was not yet in possession of any results from UCLA's assessments, which had not yet been memorialized in any document. Burbank had not yet observed Student at UCLA. Burbank teacher Ms. Michalopoulos explained at hearing that, in her opinion, Student's brief duration at UCLA made an observation inappropriate at the time. Burbank had also not observed Student at Disney, because he was no longer attending Disney by the time of the initial assessment.

Mother's credible testimony at hearing established that, at the IEP team meeting, she gave Burbank a copy of the private Developmental Assessment from assessor Marta Schmidt-Mendez, dated January 15, 2018. That report reflected that Student had a cognitive developmental age of 23 months, a receptive communication developmental age of 11 months, an expressive communication developmental age of 14 months, and a personal/social developmental age of 16 months. Burbank school psychologist Ms. Chaja established at hearing that she was aware of the report and of the discrepancy between its cognitive estimate of 23 months and her own assessment's estimate that, cognitively, Student was at the 12 to 18 month range.

Burbank staff had prepared a draft IEP document prior to the meeting. The IEP team, including Parents, reviewed it and made comments. Mother opined that the goals were not ambitious enough. Mother stated Student did not yet understand the dangers

of running into a street or wandering off. During the meeting Burbank changed the document to reflect "closer supervision during outside and unstructured activities" to address Mother's safety concerns and her request for a one-to-one aide. Mother got the final copy of the IEP at the end of the meeting.

The March 13, 2018 IEP offered an eligibility category of autism. It stated Student demonstrated delays in communication, stereotypical behavior, and social interactions which adversely affected his educational performance. It stated Parents' concerns relevant to educational progress, specifically that Parents were concerned with Student's communication skills, feeding issues, self-stimulatory behaviors, putting things in his mouth, sensory issues, lack of eye contact, and challenges following directions.

The IEP stated Student's present levels of pre-academic, academic, and functional skills, describing that Student would take his Parent's hand and lead them to communicate his wants, could complete a three-piece inset puzzle, maintain image of an object when it was out of view, could turn the pages of a board book, and could manipulate a mechanical toy by pushing a button to make it work. His weaknesses were that he demonstrated an extremely short attention span of only 20 to 30 seconds, did not yet follow one-step directions, was unable to participate in the structured part of the assessment, and did not point to pictures in a book, body parts, or named objects. These present levels of performance were accurate at the time. The evidence adduced at hearing did not contradict them.

The IEP stated present levels of communication development, with strengths and weaknesses. It stated Student demonstrated adequate oral motor skills for speech purposes at the time, and that "voice and fluency are not a concern at this time due to limited verbal production." It recounted that Student was able to respond to his name 15 to 20 percent of the time. He understood when someone was upset by the tone of their voice. He was beginning to approximate words. His weaknesses were that he was

mostly nonverbal at the time, did not follow one-step directions, answer simple questions, or understand the concept of "no." Socially, Student was not yet playing with toys appropriately and was not participating in turn-taking activities. He did not make eye contact and did not initiate interaction with peers. These present levels of performance were accurate at the time. The evidence adduced at hearing did not contradict them.

For gross and fine motor development strengths and weaknesses, Student walked well independently with a stable gait pattern. He was independent in transitions from the floor to standing and back to the floor. He displayed good protective responses. He was able to navigate across a variety of surfaces through the school campus. He could ascend and descend stairs independently. He displayed muscle weakness through his trunk and lower extremities, was fearful and very cautious on the playground structure, and was not yet able to jump with his feet off the floor or down from a low surface. His gross motor skills were delayed, at the 21-month level. His fine motor strengths were that he was able to use both hands together to carry a box of toys and transferred items at midline. He could use his fingers to pick up very small items. He could turn pages of a board book and isolate his finger to press a button to activate a toy. His weaknesses were that he did not demonstrate hand preference, did not consistently cross midline, and had low tone and hypermobility through his upper extremities. For visual motor present levels of performance, Student's strengths were that he could complete a three-piece inset puzzle, spontaneously drew a horizontal line, attempted to imitate a vertical line, and performed a circular scribble when asked to draw a circle. His weaknesses were that he appeared to be easily visually overwhelmed.

For his social-emotional and behavioral present levels of performance, the IEP listed as strengths that Mother reported Student was good at parallel play. He had started to sit near other children during circle time with prompting. He was affectionate

with his parents and sought them out for comfort. He enjoyed flipping through books, pulling things out of containers, lining things up, and watching Sesame Street. His weaknesses were that he did not yet initiate or sustain interactions, and did not yet engage in pretend play.

For sensory processing present levels of performance, the IEP noted Student appeared to demonstrate challenges in processing sensory. He had difficulty using both hands together and appropriately grading pressure. For vocational interests, Mother reported that Student responded to his name 15 to 20 percent of the time, and could assist with putting toys back in a bucket if he were assisted with modelling and hand-over-hand prompting. It was rare for him to follow a one-step direction. Mother reported he did not yet understand the dangers of running in a street or wandering off. For adaptive and daily living skills, the IEP reported Student was able to feed himself with a spoon, feed himself fruit using his fingers, sip from a straw, and pull his arm from a shirt. However, he was not yet indicating before or after he was soiled.

All the present levels of performance noted in the IEP were accurate at the time. The evidence adduced at hearing did not contradict them.

The IEP reported that Student attended preschool with a one-to-one applied behavior analysis therapist, and received speech therapy three times a week, occupational therapy twice a week, and physical therapy once a week. Burbank was aware of these levels of service at the time of the IEP.

The IEP stated that for Student to receive educational benefit, goals would be written to address attention, task completion, following directions/receptive language, object identification, group participation and social skills, communication, and motor skills.

Burbank offered seven annual goals.

Goal one, in the area of attention, was for Student to attend to an adult directed

activity for three minutes when provided sensory strategies and two or fewer verbal cues, across all domains at school in small groups and individually, in four out of five opportunities as measured by observation and teacher-collected data. This goal was to address a baseline observed during assessment of an extremely short attention span of 20 to 30 seconds for both adult-directed and self-chosen tasks.

Goal two, in the area of following directions and receptive language, was for Student to accurately follow eight one-step directions, in four out of five opportunities as measured by observation and teacher-collected data. This goal was to address a baseline that Student was not observed to follow one-step directions and that Mother reported it was rare for him to do so, and that he did not yet understand the dangers of running into a street or wandering off. The baseline stated that the IEP team was also concerned about Student putting things in his mouth, and not stopping when told to.

Goal two stated, obliquely, that it addressed the baseline behavior of elopement and putting non-food items in his mouth. There was no other behavior goal in the March 2018 IEP. Burbank checked the box stating that Student's behavior did not impede his learning or the learning of others.

Goal three, in the area of task completion, was for Student to independently complete a multi-step new and/or non-preferred activity across all domains at school when provided a model and one or fewer verbal cues, in four out of five opportunities as measured by observation and teacher-collected data. This goal was to address a baseline of difficulty engaging in the assessment process, failure to follow directions, respond to his name, or complete assessment tasks.

Goal four, in the area of "object identification," was for Student to identify 20 new objects and discriminate between these objects with 80 percent accuracy when given a field of three items and the verbal instruction to "give, show, or point," across all domains at school, across two consecutive days/teaching sessions as measured by

teacher-collected data. This goal was to address the baseline during assessment that Student did not point to pictures in a book, to body parts, or to named objects, and did not understand the concept of “give me.”

Goal five, in the area of group participation and social skills, was for Student to participate in teacher-directed group activities across all domains at school, such as circle time, table top, snack, or free time, for five minutes given two or fewer prompts, including verbal, visual, or gestural prompts, in four out of five opportunities over a three-day period as measured by teacher-recorded data. This goal was to address a baseline that Student was unable to participate in the structured part of the assessment, but that Mother reported Student had started to sit near the group during circle time with prompts from an adult.

Goal six, in the area of mobility, was for Student to demonstrate improved muscle strength, postural control, and upright balance to safely access at least three different elements of the playground structure, such as steps, slides, and ladders, with stand-by assistance from an adult in four out of five attempts as measured by teacher or therapist observation. This goal was to address a baseline that Student was cautious and fearful climbing on the playground structure, was tentative, and moved slowly.

Goal seven, in the area of expressive language, was for Student to use 15 functional words to label, greet, request and communicate his basic wants and needs during structured classroom activities, with no more than three visual, verbal and/or tactile prompts in four out of five opportunities with 80 percent accuracy as measured by classroom observations and speech staff data. The baseline was that Student mostly used gestures, jargon, and signs to communicate his basic wants and needs.

For Student’s placement, Burbank offered a special day class preschool placement in the Special Education Early Development program, also known as the “SEED” program. SEED was located at a campus known as Horace Mann Children’s

Center. There were no typically developing peers in the SEED program, which was located on a different corridor and in different classrooms from a general education preschool and daycare program that Burbank also provided at Horace Mann.

Burbank witnesses varied in their descriptions of the number of SEED classes, ranging from four to six classes or up to 10, and how many students each class generally contained, ranging from six or eight student or up to 12 students, or more or fewer. Each SEED class ran for two and a half hours. The morning classes ran from 8:30 to 11:00 AM. The afternoon classes ran from 12:00 to 2:30 PM.

According to Ms. Michalopoulos, SEED comprised ten different classrooms that addressed different developmental levels and had different student-to-teacher ratios. Ms. Chaja clarified that five classes were in the morning and five in the afternoon. One of the morning classes was autism-specific. One was dedicated to students with intellectual disabilities. This was known as the "Stepping Stones" class and was dedicated to teaching functional life skills rather than academics or pre-academics. Other options of SEED classes were older children whose biggest area of need was social skills. All the others were addressing pre-academics. Mother was not informed of these potential different classes at the time of the March 2018 IEP. Burbank team members intended Student would not attend the functional skills program, but neither this intent nor the different types of SEED class options was discussed at the March 2018 IEP team meeting.

Each Burbank witness had an undisclosed idea about how Student's specific placement within SEED would be determined. These internal thoughts were not revealed at the IEP team meetings, nor were they always consistent with one another. Ms. Michalopoulos' view was that the specific class, out of the ten, would be decided in the future after Mother had observed the SEED program, but would not necessarily require an IEP team meeting.

Ms. Chaja explained that neither the autism-specific class, nor the functional life skills class, nor the older social skills class was being offered, although the IEP did not explicitly so state and Ms. Chaja did not explain why or why not. Ms. Chaja's view was that Burbank was considering one of the morning classes that served younger children, which would be one of the three morning classes but not Stepping Stones or the autism-specific class. Ms. Chaja explained that the IEP was not specific because it was a discussion to introduce Mother to the program, which she could then go observe. However, Ms. Chaja acknowledged that sometimes an IEP could specify a particular SEED class, but did not do so here.

Like Ms. Chaja and Ms. Michalopoulos, Ms. Riven could not explain which SEED class was being offered. She described the morning SEED program with a smaller class of six to seven children, ranging in age from three- to five-years old, with three adults. She acknowledged that there could be developmental differences between children in these age ranges, and did not know specifically what would be the profile of the other children in the class with Student. Nor could she recall whether the IEP team discussed what would be the appropriate role models for Student to be educated with, for example in terms of the other children's use of speech.

For any particular school year, teachers might be rostered and students grouped according to their profiles, after the IEPs at which the SEED program was offered. Burbank staff would try to group the students in the SEED classes based on similar academic needs, and although at the IEP team meetings a particular student's IEP team might discuss the range of available classes, particular placement decisions might not be known at the time of the IEP and might be made afterwards. The grouping decisions were made by staff, and parents would receive a room assignment after the IEP team meeting. All Burbank staff who testified at hearing, particularly Burbank's Special Education Coordinator at the time, Gina Ramallo, and special education coordinator Mr.

Concidence, were very vague in their recitation of how particular placement decisions were made. The ALJ inferred that upcoming SEED classes were offered in IEPs, but the particular population of students who might attend were still unknown at the time the IEP offers were made. Over time, as the particular students who were offered SEED coalesced, staff would assess the needs of that year's, or that semester's, SEED population and then create the groupings. Thus, Student's IEP did not specify the class, and it might have been impossible to be more precise at the time of the IEP.

The co-located general education preschool at Horace Mann served three to five-year olds. It ran for four hours, from 8:30 AM to 12:30 PM every morning. Burbank also provided a daycare program that ran from 7:00 AM until the preschool started at 8:30 AM, and after school until the evening. Together these were known as the "child development program." Because the general education preschool only had morning classes, but SEED had both morning and afternoon classes, there could only be interaction between general and special education SEED students in the morning sessions.

The IEP offered that Student would spend 15 percent of his time inside a "regular," meaning general education, class. However, the notes and testimony made it clear that Burbank actually did not contemplate that Student would spend any of his time in general education at all. Rather, the IEP notes and Burbank witnesses' testimony indicated Burbank's intent was to offer 60 minutes per week of what was referred to as reverse mainstreaming. This reverse mainstreaming involved general education children coming into the SEED program classrooms for part of the day. Burbank's witnesses were vague in their explanations as to how the reverse mainstreaming was to be implemented, especially because it was not clear whether Student would attend SEED in the morning or the afternoon. The interactions between the SEED and general education programs varied over time. There might be interactions between SEED and the general

education populations during recess or during instructional time, but this was not specifically prescribed. During the 2017-2018 school year, there was no specific programming for special education students to attend any part of the general education preschool program, or vice versa. The degree, type, location, and timing of interaction, if any, with general education preschoolers was not specified. Although the offer stated 60 minutes per week, Ms. Chaja's understanding was that this time would be broken up into 15 minutes per day. This was not specified in the IEP. Ms. Chaja explained that the time of day of the reverse mainstreaming could vary. It could be either be during structured time or during play. It would depend on the teacher's schedules. Generally, four to five general education students would come over from the general education program into the SEED classroom.

Ms. Michalopoulos explained at hearing that the Horace Mann center housed seven or eight general education preschool classes ranging in age from six months up to five years, but then her testimony conflated general education preschool with day care and, confusingly, indicated these were both the same. Ms. Michalopoulos did not know if the general education programs were offered in the morning or the afternoon. She unpersuasively opined that even if Student were to interact with the afternoon day care portion of Horace Mann, Student would nevertheless be interacting with typical peers, and that this would be tantamount to mainstreaming.

The March 2018 IEP did not offer Student one-to-one aide services. It stated his behavior did not impede his learning or the learning of others. Burbank's Special Education Coordinator at the time of the IEP, Gina Ramallo, described what would have been the process for students to receive aide services in the SEED program. An assessment for an aide was called a special circumstances instructional assistant assessment. If needed, such an assessment would be offered to the family to assess for a variety of behaviors and "special circumstances," such as health-related procedures. A

special circumstances instructional assistant assessment was different from a functional behavioral assessment, which explored the function of behaviors. A special circumstances instructional assistant assessment assessed for problematic behaviors but not their functions. The recommendation to perform a special circumstances instructional assistant assessment would have been made based on the social-emotional components of Burbank's psycho-educational assessment.

Ms. Chaja felt Student would make more progress in the SEED program, as compared to Disney with a one-to-one aide. In her opinion, the professionals who taught the SEED program, who all held both general education and special education teaching credentials, were more qualified to advance Student's development than applied behavior analysis providers, who could be college or graduate students, or general education preschool teachers who need not hold any teaching credential of any kind. Ms. Michalopoulos at hearing explained that Burbank determined Student would not need a one-to-one aide in the SEED program, based on the low student to teacher ratio, the staff training, and the desire to inculcate independence with less prompting. The SEED facility was secure. All the gates were locked. All hallway doors were closed. Ms. Michalopoulos had no elopement concerns based on the security of the facility. At hearing, Ms. Michalopoulos explained that although Student's elopement and mouthing of non-food items could be safety concerns, eloping in a locked room is not a safety concern. But she admitted that for all parts of his school day, it was not known whether he would be in a locked room or not.

The March 2018 IEP did not offer a behavior support plan. Ms. Chaja explained at hearing that a behavior support plan is not always needed to provide appropriate behavioral supports, which can be "embedded" in a program. Student's goals would have directed his teacher how to implement them, plus as discussed below, the IEP also offered "closer supervision." This "closer supervision" was to ensure that one of the

existing adults focused on Student during unstructured time.

Burbank employed a Board-Certified Behavior Analyst and various applied behavior analysis-trained assistants who sometimes were engaged in particular SEED classes depending on the needs of the students in a classroom at that time. On occasion, the Board-Certified Behavior Analyst attended IEP team meetings. Some IEPs specified particular behavioral services. Some SEED students received aides, but not all. The SEED teachers and assistants were all trained to provide behavioral interventions when necessary. Applied behavior analysis strategies might be embedded in certain of the SEED classrooms by applied behavior analysis-trained staff, but not in other classrooms.

As it was not always specified in an IEP exactly which SEED class a student would be placed in, the IEP would also not specify what personnel would be employed in that class, nor the level of training the staff received, nor what, if any, behavioral supports or personnel would be embedded in the class.

For related services, Burbank offered Student behavior intervention services of 30 minutes each day of individual support. This was not a full time one-to-one aide. It was to be provided for a 30-minute portion of the day, during the school day, to work on Student's IEP goals. Confusingly, although the SEED program ran five days a week, the behavioral services were only offered for four of the five days for a weekly total of 120 minutes. The IEP stated this would be in a separate classroom, i.e. the SEED classroom. The manner in which this service would be implemented was unclear. The specific type of qualification of the person to provide this service was not noted. The IEP had no behavior support plan and, except for goal two, no other behavior goals. Since Burbank had checked the box that Student's behavior did not impede learning of himself or others, it was not clear what the offer of behavior intervention services for individual support for 30 minutes for four days was intended to accomplish, nor what goals would

drive either these behavioral services or the ones that were embedded into the SEED program.

The IEP offered 60 minutes per week of occupational therapy, one 30-minute session a week individual pull-out, and one 30-minute session per week described as push-in classroom collaboration. Occupational therapist Ms. Anderson asserted this offer was appropriate. The push-in collaborative setting was a group session with other children. In her opinion, sensory strategies can assist in socialization and can be generalized. Although the word "clinic" was not stated in the IEP, the pull-out individual session would have been in a clinic setting at Horace Mann.

Burbank offered Student physical therapy of one weekly 30-minute session.

The March 2018 IEP offered 60 minutes total weekly speech therapy in two 30-minute sessions. One session would have been an individual 30-minute language and speech therapy session. One would have been a small group pull-out speech therapy session.

The speech assessment revealed extreme needs and severity, with Student performing expressively and receptively lower than the first percentile. At the IEP, Ms. Riven recommended two weekly 30-minute sessions of speech and language services, one individual and one in a small group. At hearing, Ms. Riven was unable to provide a convincing explanation of why two times 30 minutes was the appropriate intervention, other than to generically state that the recommendation was "based on his needs." She bolstered her recommendation by opining that the offered SEED program was a "language-rich, intensive program." She also explained that she recommended the group speech sessions in order to work on Student's social communication, to try to get him to learn from other children, and to begin to develop the awareness of others in the first instance. She felt that even though he was nonverbal at that time, he could use gestures, such as handing preferred items to others.

Student's private speech and language pathologist Beth Phillips opined at hearing that the level of services offered in March 2018 would have been insufficient when she first met Student in May 2018. Also, she felt that group speech therapy was not appropriate for him because he did not yet have the attention or the language to benefit from it. For that reason, Ms. Phillips did not work with him in small groups, only individually.

For extended school year, the IEP offered services from June 11 to July 12, 2018. It offered 480 weekly minutes, at 120 minutes a day for four days a week, of individual and small group instruction. It offered once weekly occupational therapy for 30 minutes individually. It offered once weekly physical therapy for 30 minutes individually. Burbank's offer of related services for speech was one 30-minute weekly small group pull-out therapy session. Behavior intervention services were offered for 30 minutes twice weekly, totaling 60 minutes, individually, "to focus on IEP goals during Student's school day."

Ms. Chaja at hearing gave unpersuasive and unsatisfying testimony about how this amount of extended school year services was determined to be sufficient to prevent regression. She did not readily acknowledge that extended school year, like other special education and related services, should be individualized, and simply stated that this amount of services was what Burbank offered to all children who qualified for extended school year. Ms. Michalopoulos at hearing recalled that Mother, at the March 13, 2018 IEP team meeting, expressed her concern about the time gap between the regular school year and extended school year. Ms. Michalopoulos could not recall if Burbank responded to that concern, but she unconvincingly opined that Student "did not have a history of regression of skills." Ms. Anderson could not recall the IEP team discussing any offer of extended school year beyond the "typical" extended school year period. None of this testimony was persuasive that the offer of extended school year

was individualized to Student's needs.

The March 2018 IEP stated Student did not require assistive technology devices or services. The IEP form had a place to state the rationale for this determination, but none was provided.

For supplementary aids and services and other supports, the IEP offered verbal, visual, gestural, and hand over hand prompts. Directions would be repeated or rephrased. It offered "front-loading," a term that was not explained at hearing. It offered sensory strategies including movement breaks, deep pressure, heavy work, and reduced external stimuli. To address Mother's concerns with Student's behavior, the IEP offered "closer supervision during unstructured and outside activities," daily throughout the day in the classroom and playground.

In pertinent part, the IEP notes indicated the following IEP team discussion. Mother was concerned with Student putting things in his mouth. The notes state these and other concerns would be addressed through goals, by which Burbank apparently intended to refer to goal two in the area of following directions. This was the only goal that addressed the baseline concerns of elopement and mouthing of non-food items.

The IEP team meeting ended with no consent to the offer. Mother requested the opportunity to observe the offered SEED classrooms.

AFTER THE MARCH 13, 2018 IEP

March 27, 2018 was Student's third birthday. At the time of his third birthday, he was in the UCLA partial hospitalization program.

On April 9, 2018, UCLA speech and language pathologist Ms. Gross authored a speech report advocating for the use of an augmentative and alternative communication system. The report recounted that because Student did not have a consistent functional communication system in place, she determined that augmentative and alternative communication be implemented. It was clear from the report that this

determination did not occur until Student was already in the UCLA program. Ms. Gross selected a voice output device, specifically Proloquo2Go on the iPad, as the most effective augmentative and alternative communication for Student. Ms. Gross's report advocated for the use of Proloquo2Go across settings. Mother presented Ms. Gross's letter to Burbank on April 17, 2018.

On April 10, 2018, Student's pediatrician wrote a letter advocating for a one-to-one aide for Student. In the doctor's opinion, an aide was required for Student to access the curriculum even in a structured classroom setting with three teachers and eight students. Student needed constant support and supervision. The doctor opined that it took substantial effort by an adult to engage Student. He also mentioned Student's lack of safety awareness and potential to elope. He noted Student's clear potential to learn and clear progress he had made. Mother presented the pediatrician's letter to Burbank on April 17, 2018.

On or about April 11, 2018, Mother observed a SEED classroom. She felt the classroom was chaotic and not appropriate for Student. The other children were bigger, taller, and older. At the time, Student was at UCLA getting intensive intervention and that was Mother's frame of reference as to what he required. In April 2018, Mother was contemplating putting Student back into Disney after his discharge from UCLA, but only with a one-to-one aide. Student had not had a one-to-one aide while in the UCLA intensive program. Mother could not envision Student in either SEED or Disney without one-to-one support.

APRIL 17, 2018

On or around April 17, 2018, Mother wrote to Burbank outlining her disagreements with the March 13, 2018 IEP offer. Mother's letter presented Ms. Gross's April 9, 2018 speech report advocating for the use of augmentative and alternative communication, and the pediatrician's letter advocating for a one-to-one aide. Mother

disputed whether the special education classroom placement was appropriate for Student's functional level or sensory coping capabilities. She disputed that the three-to-eight teacher-to-child ratio in the classroom and the lack of individual support were appropriate. She noted Student was very sensitive to noise, and the classroom she observed was loud and chaotic. She also felt the functional level of the children observed in the classroom was significantly more advanced than Student. Although, as her letter stated, she understood the concept of Student learning from more advanced children, she believed there was a large learning gap between these children and Student, and he would not have been able to keep up or make progress. She also expressed concern about the gap of time, during breaks before and after extended school year, and asked for year-round continuous with services with no breaks, as opposed to the 19 day extended school year period. She was also concerned about the short SEED school day. Mother disputed the IEP's statement that Student did not require augmentative and alternative communication and referred to Ms. Gross's report attached to Mother's letter. Mother also stated specific objections to the goals and short-term objectives and disputed the offer of "closer supervision." She requested that a social skills goal be added to the IEP. She again requested full time one-to-one aide support. She requested more related services hours be added in the offer of extended school year.

APRIL 17 THROUGH MAY 9, 2018

In response to the April 17, 2018 letter, Burbank asked Mother to observe more SEED classes, requested to observe Student at UCLA, and scheduled an IEP team meeting for May 15, 2018. Mother authorized Burbank to observe Student at UCLA.

On May 1, 2018, private speech and language pathologist Ms. Philips saw Student for the first time. She wrote a letter indicating her initial impression of Student. She noted Student was using an iPad while at UCLA but that Parents were not using it at

home.

On May 3, 2018, Mother canceled the May 15, 2018 IEP team meeting and sent a notice of unilateral placement. The notice stated Parents intended to enroll Student at Disney and seek reimbursement of the costs, beginning May 21, 2018, based on Parents' disagreement with Burbank's offer in the March 13, 2018 IEP.

On May 4, 2018, UCLA began drafting its discharge report in contemplation of Student's upcoming discharge from their program. On or around May 4, 2018, UCLA held a discharge meeting to explain to Parents and Student's providers what progress he had made and what goals to work on. Burbank was not invited.

On May 9, 2018, in response to Mother's ten-day notice, Burbank sent a prior written notice letter. The prior written notice stated Burbank declined to reimburse for the Disney placement. It reiterated the offer that had been made at the March 13, 2018 IEP and stated that based on its assessments, Burbank considered the SEED program with the offered level of related services to be appropriate. Thus, the prior written notice addressed the refusal of Mother's requests for general education placement, with applied behavioral analysis interventions consisting of a one-to-one aide for the full school day and direct one-to-one intervention outside the school day for 30 hours per week, and increased frequency and duration of speech and language and occupational therapy services.

MAY 11, 2018 OBSERVATION AT UCLA

Ms. Chaja and Ms. Michalopoulos observed the UCLA program on May 11, 2018. Ms. Chaja credibly opined at hearing that although there was a classroom at UCLA the program, a partial hospitalization program, requiring medical certifications, was clinical and therapeutic in nature rather than solely educational. Student was in a classroom of four students and three to four adults. He was prompted both verbally and with gestures. He wandered the room and was then led by the hand to a segregated work

area where he was prompted to sit down. He was then prompted to touch his nose, ears, and eyes. He responded correctly to some prompts but not others, pointing to wrong body parts. He was prompted to stand up, and he held his hand up for the therapist to hold as they left the room. He played stacking blocks on top of each other with a peer. He held hands with adults and sat down at the appropriate time. He followed the directions to "sit down" and "stand up."

In Ms. Chaja's opinion, UCLA was unlike a preschool because it was a therapeutic program, which was in her view a very restrictive placement on the continuum of options. Even if it were considered to be an educational placement, Student's engagement with peers was limited to parallel play. Each of his activities was facilitated by adults. She did not observe him using any augmentative and alternative communication device.

At some point after Burbank sent the prior written notice. Burbank and Parents agreed to an IEP team meeting date of June 6, 2018. May 18, 2018, was Student's last day at UCLA.

Although UCLA had begun its discharge report on or around May 4, 2018, at or around the time of the discharge meeting, it did not complete the report until several weeks later. Mother received her copy of the UCLA discharge report a couple of weeks after the actual May 18, 2018 discharge, sometime in early June. Even though the date on the report is May 4, 2018, it was not actually completed at that time.

MAY 21, 2018

On May 21, 2018, Student left UCLA and went back to Disney. Ms. McNulty noticed that he started to blossom faster after UCLA. He followed other children, engaged with them, sat at the sensory tables attending to water and sandbox activities, rode the bicycles, and played on balance beams. After he returned from UCLA, he actually interacted with other children whereas before he was engaging, at most, in

parallel play activities. He and other children did puzzles and played with toys together. However, the play was not independent. It was always facilitated by Student's one-to-one aide. Student was strong in pre-academics. He could count, sort, and he knew his ABC's. He was mainly nonverbal during his time in her classroom in the late spring of 2018. Burbank did not observe Student at Disney during this time frame.

JUNE 2018

After the May 11 observation at UCLA, and before the June 6, 2018 IEP team meeting, Burbank staff including assessors Ms. Riven, Ms. Michalopoulos, and Ms. Anderson met to discuss Mother's April 17, 2018 letter and its attachments, including Ms. Gross's speech report recommending augmentative and alternative communication. They drafted proposed revisions to the March 2018 IEP's draft goals and wrote proposed new goals. Although some of the witnesses at hearing, particularly Ms. Riven and Ms. Michalopoulos, appeared confused as to the timing of Burbank's review of UCLA documents, the documentary record was very clear that the review of UCLA documents occurred before June 2018, and concerned Ms. Gross's April 2018 speech report requesting augmentative and alternative communication.

JUNE 6, 2018 IEP

By June 6, 2018, District staff had drafted proposed new goals. At the June 6, 2018 IEP team meeting, Mother was handed the June 6, 2018 IEP document with the new draft proposed goals when she arrived. Some goals and other content were modified at the June 2018 IEP team meeting. A final version was sent to Mother a few weeks later.

The draft changed the March 2018 IEP determination that Student did not require assistive technology from "no" to "yes." It stated, "Student will have access to a communication device as well as communication software throughout his school day

and during therapy session. He will also have access to picture communication systems and visual schedules.”

Goal one, in the area of attention, lowered the number of prompts Student would be given, from two to one.

Goal two, in the area of following directions and receptive language, raised the number of one-step directions Student would be asked to follow, from eight to 15 one-step directions.

The title of goal three, in the area of task completion, was changed to state that it related to behavior as well as task completion. The goal itself was significantly changed in that it had originally stated Student should be asked to complete tasks “independently” when “provided a model.” These words were deleted such that he would no longer aim towards independent task completion when modelled.

Goal four was in the area of “object identification.” It was changed to state that Student would identify 30, as opposed to the original 20, new objects.

Goal five was in the area of group participation and social skills. It was revised to delete certain proposed group activities including circle time, table top, snack, and free time, and replace them with “daily routines,” including music, toileting, and snack.

Goal six in the area of mobility was not changed.

Goal seven, in the area of expressive language, was changed to lower the number of visual, verbal, and/or tactile prompts from three to two. It raised the level of functional words from 15 to 30. It added a variety of “response modes” to include a communication device, picture communication system, signs, or verbal response.

Three entirely new goals, numbers eight, nine, and 10, were added in the June 6, 2018 IEP draft document.

Goal eight was in the area of play and social skills. It stated that Student would learn to play with five new developmentally appropriate toys with one or more peers in

four out of five opportunities. The baseline was that Student did not yet initiate or sustain interaction, did not engage in pretend play, and only engaged in parallel play.

Goal eight was based on Mother's April 17, 2018 letter requesting a social skills goal. However, by the time of the June IEP, Mother did not agree the social skills goal Burbank proposed was appropriate as she felt it was not ambitious enough. At UCLA, Student had been engaging in pretend play.

Goal nine was in the area of mobility. It stated that Student would demonstrate improved muscle strength and postural control to be able to jump with both feet off the floor with one hand held in three of five tries, as measured by teacher or therapist observation. Student's baseline was that he walked well independently though was not yet able to jump with his feet off the floor.

Goal 10 was also in the area of social skills. It stated that Student would actively participate in and sustain interaction with one other peer for three minutes during structured play activities, when facilitated by an adult, in four out of five opportunities as measured by observation and teacher-collected data. The draft IEP stated that the baseline was drafted according to the exit report from UCLA, to the effect that Student required gestural and physical prompts to engage in and sustain parallel play with his peers. However, as discussed below, the UCLA discharge report was not presented to Burbank until this June 2018 IEP team meeting. Therefore, it is unclear how, if at all, this draft goal, which apparently existed before the June 2018 IEP team meeting was convened, could have been based on the UCLA discharge report.

Burbank continued to offer placement in the "SEED" program. For related services, Burbank revised the March 2018 offer of behavior intervention services. The March IEP had offered 30 minutes times four, totaling 120 minutes, of individual support, to be provided during the school day to work on IEP goals, and to be provided during the school day. The June 2018 IEP revision had the same 120 minutes weekly but

organized differently. Instead of 30 minutes times four during the school day, the offer was revised to state 60 minutes times two outside the school day. However, even though it was outside the school day, the box indicating that it was to be in a separate classroom, meaning the SEED classroom, remained checked. The IEP continued to have no behavior support plan. There were no new behavior goals. The title of goal three was revised from "task completion" to "behavior/ task completion." Burbank continued to indicate that Student's behavior did not impede his learning or the learning of others. Other than modifying the goal about task completion, no changes were made in the area of behavior.

In the area of occupational therapy, the March 2018 IEP offer was revised. In March, Burbank had offered 60 minutes per week of occupational therapy, one 30-minute session a week individual pull-out, and one 30-minute session per week described as push-in classroom collaboration. In June 2018, the total number of minutes and sessions remained the same, but the offer was revised to make both sessions individual pull-out. Ms. Anderson at hearing defended her prior offer of group occupational therapy. She stated that this offered change to two individual sessions was in the spirit of compromise with Mother at the June 2018 meeting, to encourage her to allow Student to attend Burbank's program.

Burbank again offered physical therapy of one weekly 30-minute session.

Burbank did not change its March 2018 IEP offer of speech services. The June IEP continued to offer one individual weekly 30-minute session and one small group pull-out speech therapy session.

Burbank did not change its offer for extended school year.

The June 2018 IEP continued the March offer of supplementary aids, services and other supports including "closer supervision during unstructured and outside activities," daily throughout the day in the classroom and playground. The June IEP also added the

accommodation of “longer processing and response time as appropriate.”

The IEP notes indicated that the purpose of the meeting was to address Mother’s April 17, 2018 letter. In light of Mother’s letter and attachments, particularly Ms. Gross’s speech report, Burbank proposed to undertake its own formal augmentative and alternative communication evaluation and proposed an assessment plan. Mother and an advocate who accompanied her to the meeting stated they would not consent to a Burbank assessment.

Mother requested three hours of speech and language services per week during the regular school year. There was dispute and discussion about whether Burbank’s offer should be for group or individual therapy. Ultimately Burbank stood by its offer of two 30-minute weekly sessions with one individual and one group. There was discussion of the reasons for each party’s position. The notes stated, “This serves as prior written notice to parent’s request for speech and language services.” Burbank denied the request again, stating the denial was based on Student’s present levels of performance, assessment, unique needs, his goals, and input from all team members including Parent.

The notes indicated that a communication device was being offered in this IEP. The specific augmentative and alternative communication device that was being offered was not stated since an augmentative and alternative communication assessment had not been conducted by Burbank. However, Burbank offered an iPad with Proloquo2Go to be trialed in the special education classroom.

There was discussion and dispute regarding behavioral services. Parent requested 30 hours per week of aide services. Ultimately, Burbank stood by its position that it would offer Student adult support for safety and supervision, but not a dedicated one-to-one aide. Burbank reiterated its current offer of two hours weekly outside the school day. The notes also stated that classroom aides were applied behavior analysis-trained, and a behaviorist provided onsite support. After discussion, it was acknowledged that

there was disagreement about the appropriate level of behavioral intervention services. The IEP notes stated that they would serve as District's prior written notice denying parent's request for a total of 30 hours of applied behavior analysis per week. The notes stated that Student's assessment results, present levels of performance, and goals had been considered, as well as input from all team members including Parent.

There was discussion and dispute about what was the least restrictive environment for Student, with Parent requesting general education. There was also discussion about the size of the SEED classes. Burbank took the position that it would not define the size of the classroom in the IEP but that classrooms typically had eight to 12 students in the special education early development program. Parent's advocate accompanied her to the IEP and stated that they felt a general preschool program with a one to one aide was the least restrictive placement. Burbank IEP team members observed that Student was overly reliant on the adult in the school setting, and for this reason, they did not recommend that he have a one-to-one aide assigned. Parent informed Burbank that she intended to keep Student unilaterally placed in private preschool and would request Burbank to fund the program at Disney.

There was discussion and dispute about extended school year services. Burbank stood by its offer, stating that Student had not been observed to regress during school breaks. Burbank rejected Parent's request for a continuation of all services during summer break, without any gap.

Mother reiterated her concerns about Student putting things in his mouth.

At the June 2018 IEP, Mother provided Burbank with the final UCLA discharge report. This was the first time Burbank was made aware of its contents, including its recommendations for placement, services, curriculum, and goals. Burbank and Mother agreed that the discharge report should not be addressed at this IEP team meeting but at some time in the future.

Sometime in June 2018, Student began attending private speech therapy sessions with speech and language pathologist Ms. Phillips. Ms. Phillips charged \$100 to assess Student and \$90 per session. From inception until April 2019, Student attended nine to 13 sessions each month, approximately three times each week, for 30 minutes, for a total of 113 visits at a total cost of \$10,170. Ms. Phillips felt 30 minutes was the limit of a young student's level of attention. At hearing, Mother presented estimates of how much she would pay Ms. Phillips from the time of hearing until the time this Decision is issued, of twelve sessions each month for the months beginning May 2019. Mileage travelled to each session was between 15.5 and 15.8 miles from Disney Children's Center. Mileage home after each session was 12.5 miles. Ms. Phillips testified at hearing to her busy practice, her excellent credentials, her opinion that Student had high cognition, and the remarkable progress Student made during his time with her. Student was not at age level in his speech skills, but Ms. Phillips believed he could reach age level with intensive services. By July 2018, Student was making outstanding progress. He was starting to use language with intent, and to produce intelligible words. By September 21, 2018, he had made more progress that Ms. Phillips described as "tremendous." He was using words and phrases, and labelling objects. By March 2019, he was singing songs with Ms. Phillips and could identify categories of animals, people, and food. At the time of hearing, Ms. Phillips recounted Student had recently used full sentences, asking for preferred toys, such as, "May I have the farmer with the red hat?" and, "May I have the farmer with the blue hat?". Ms. Phillips did not see the March 2018 IEP but has been working on goals that are consonant with its goals, including following directions. Reviewing the March 2018 IEP at hearing, Ms. Phillips opined that Student had met goal seven by October 2018. He had met goal four, to use 15 functional words to label and greet, by November or December of 2018.

UCLA DISCHARGE REPORT

The UCLA discharge report was finalized in late May 2018 and given to Parent in early June. Mother gave it to Burbank on June 6, 2018. It contained information concerning the entire 12-week time span of Student's stay there. The time frames were jumbled in the report and not easy to discern. The report reflected the results of Student's original assessment by UCLA when he entered the program on or about February 21 or 22. It reflected UCLA's treatment goals and treatment plan. It reflected Student's progress over the 12-week time span of the program and his "current" functioning, although the time frame of the term "current" was not stated. It contained the results of assessments that were performed after admission, most notably a functional behavioral assessment and an augmentative and alternative communication assessment, although the timing of these are not stated and must be inferred from context.

It contained UCLA's final conclusions and recommendations as of the discharge date on or around May 18, 2018, for services and goals for the six months to one year following the date of discharge. The various UCLA specialists who worked with Student, overseen by Ms. Paparella, wrote these recommendations. The recommendations were what UCLA considered an appropriate level and intensity of service to ensure Student's continued development. Ms. Paparella was a superbly credentialled, highly trained, careful, and extremely knowledgeable clinician, and a credible witness. Her testimony was given great weight.

UCLA stated Student required active engagement in a developmentally appropriate and structured intervention program every day, including classroom time, individual direct instruction, speech and language therapy, and occupational therapy. UCLA recommended services be provided immediately upon discharge from the partial hospitalization program to prevent regression or loss of skills.

For classroom and direct behavioral intervention, UCLA recommended Student receive a comprehensive early intervention program including a classroom with a structured daily schedule, small class size, high staff-to-student ratio, individualized programming, and behavioral support to target core deficits in autism and develop pre-learning skills. UCLA noted in its report, but did not necessarily recommend, that Student would return to the general education class at Disney. This appeared to be only a statement of fact in the report, not anything that reflected UCLA's recommendation as to an appropriate placement.

UCLA also recommended a one-to-one aide to facilitate his ability to navigate the classroom and with regard to his social development. UCLA recommended Student receive 30 hours per week of applied behavior analysis services including individual support in the classroom, in-home one-to-one direct behavioral intervention, and additional hours for supervision and other administrative duties. UCLA recommended the in-home applied behavior analysis hours include parent training to help the family address behaviors that occurred at home and in the community.

UCLA stated it was critical that Student receive services for the entire year from the date of discharge in order to minimize transitions, prevent regression, and continue to improve and maintain his skills.

UCLA recommended individual speech and language therapy provided by a licensed speech-language pathologist for at least three hours per week to facilitate continued development of Student's overall communicative functioning. UCLA recommended use of an augmentative and alternative communication device. Proloquo2Go on an iPad was the application and device the UCLA speech therapist had determined to be appropriate.

UCLA recommended Student receive clinic-based occupational therapy one hour per week to address organization of behavior, attention, frustration, self-regulation,

sensory processing, fine motor and pre-writing skills, motor-planning and gross motor skills, and play and social skills. The UCLA occupational therapist did not specify whether the clinic sessions should be individual or group. Also, at hearing, she testified that two 30-minute sessions might be as effective as one 60-minute session. Burbank's occupational therapist Ms. Anderson opined at hearing that UCLA's recommendation of one 60-minute session was inappropriate due to Student's short attention span. She preferred to break the sessions up. Also, she opined she would not want Student to miss a full hour of class while receiving occupational therapy.

UCLA recommended detailed goals for a period of no longer than six months, or until approximately January 2019. For preschool readiness skills, UCLA recommended the following goals:

- Student will imitate 15 one-step proximal actions with and without objects;
and
- Student will receptively and expressively identify five body parts.

For the classroom, UCLA recommended the following goals:

- Student will independently participate in a variety of 15-minute structured group activities in 80 percent of opportunities;
- Student will sustain his attention for 10 minutes in 80 percent of group activities; and
- Student will follow group instructions in 80 percent of opportunities.

For social development, UCLA recommended the following goals:

- Student will independently initiate play for 10 minutes at any level between specific combinations, with conventional attributes and pretend self, for example relating object to self, indicating a pretend quality, such as bringing a cup to his own mouth as if to drink, at least two times per day;
- Student will independently initiate and respond to greetings and farewells

with two adults with a wave, approximation of "hi/bye," and eye contact in 80 percent of opportunities; and

- Student will independently respond to his name with eye contact in distal settings without distractors in least 80 percent of opportunities across multiple settings.

For behavior, UCLA recommended the following goals:

- Student will follow through with 80 percent of adult directions without non-compliant behaviors such as verbal protests or no response, across two settings, meaning home and school;
- Student will reduce visual stereotypy and use replacement behaviors of functional play in 80 percent of opportunities; and
- Student will reduce oral stereotypy and use replacement behaviors of functional play in 80 percent of opportunities.

For speech and language, UCLA recommended the following goals:

- Student will follow 10 new one-step directions independently with a mastered concept embedded in 80 percent of opportunities across settings with a distractor present;
- Student will use a total communication approach such as signing, gesturing, verbalizations, and determined augmentative and alternative communication to make requests and comment in 80 percent of opportunities across settings;
- Student will consistently demonstrate understanding of 20 new age-appropriate vocabulary words of nouns, verbs, and spatial concepts, and express them using a determined augmentative and alternative communication or verbal approximation in 80 percent of opportunities;
- Student will respond to yes/no preference questions with gesture, verbal approximation, or determined augmentative and alternative communication

- in 80 percent of structured opportunities;
- Student will respond to 'What is it?' using a determined augmentative and alternative communication or verbal approximation accurately in 80 percent of opportunities across settings;
 - Student will participate in adult-directed dyadic engagement activities across four turns each in 80 percent of opportunities with appropriate gestures, sound fill in, and eye contact;
 - Student will produce age-appropriate phonemes in imitation with necessary prompting in 80 percent of opportunities in structured tasks; and
 - Student will accurately imitate mastered phonemes and syllables of consonant-vowel and vowel-consonant in varied presentation in 80 percent of structured opportunities when provided visual or tactile cues.

For occupational therapy and motor planning skills, UCLA recommended the following goals:

- Student will demonstrate an increase in safety and coordination as evidenced by ascending the hanging ladder by alternating hands and feet facing the ladder with moderate physical prompts and descending the ladder by alternating hands and feet with physical support as needed, in one out of three opportunities;
- Student will demonstrate improved ideation and flexibility of play during unstructured opportunities, by selecting one activity from two options and tolerate adult engagement for two minutes, in three out of three consecutive sessions;
- Student will don his socks with minimal physical prompts to open the sock using both hands in one out of three opportunities;
- In preparation for improved graphomotor skills, Student will imitate a

- horizontal line with a marker on a sheet of paper with moderate verbal prompting, in two out of three opportunities;
- Student will demonstrate improved grip strength by separating four connector blocks with verbal encouragement as needed, in two out of three opportunities;
 - Student will imitate building a bridge with three cube blocks with verbal cues as needed, in two out of three opportunities;
 - Student will demonstrate improved pincer grasp and bilateral coordination by donning four medium buttons, in three out of four opportunities; and
 - Student will jump with his feet leaving the rebounding surface, meaning a trampoline, with support of the handrail or therapist, with demonstration and verbal cues as needed, in two out of three opportunities.

For sensory processing, neuromuscular development, and coordination skills, UCLA recommended the following goals:

- Student will demonstrate improved upper extremity strength and endurance by sustaining his weight on his hands without collapsing onto his elbows for 30 seconds with support at his hips, in three out of three opportunities;
- Student will demonstrate improved tolerance to vestibular input by engaging for at least five minutes on one piece of moving equipment which may include swings such as tire swing or moon swing, or trapeze with minimal physical support from the therapist and without engaging in avoidance behaviors, with verbal encouragement as needed, in two out of three opportunities;
- Student will demonstrate improved balance as evidenced by crossing a balance beam for five steps without support and without losing balance, in two out of three opportunities;

- To improve Student's overall regulation by 25 percent, targeting improving his attention and engagement, and decreasing his maladaptive behaviors related to rigidity and non-compliance, sensory strategies will be incorporated into his classroom routine and as needed in combination with behavioral strategies.

As of the June 2018 IEP, Burbank had received a copy of the UCLA report. The evidence did not establish that Burbank's team ever considered the UCLA discharge report. Although some of the witnesses, particularly Ms. Riven and Ms. Michalopoulos, recalled meeting to discuss the report and revise goals based on it, the documentary evidence did not corroborate this recollection. No new goals were written after the June 2018 IEP team meeting. Thus, it appears that the witnesses were confused as to the timing of their meeting and which UCLA document they reviewed. The ALJ infers that the Burbank team members met between April 17 and June 6, 2018 to review Ms. Gross's UCLA speech report and revise goals based on it. But, it did not appear that they ever met after the June 2018 IEP team meeting to review the final UCLA discharge report that they received at the June IEP team meeting. Despite their contrary recollection, they assuredly did not re-draft any proposed goals based on it.

SUMMER 2018

B.I.G. Solutions generated a progress report in July 2018. Student had made progress from January. He followed one-step directions, identified body parts, washed his hands, put his socks and shoes on, imitated vowels and said mama and dada. Language was emerging. He was using his assistive technology in the form of a vocal output device with Proloquo2Go software, which spoke the names of picture icons when he pointed at them. In Ms. Sotodeh's opinion, the device was helping him communicate. Ms. Sotodeh recommended the service hours remain the same. It was not established at hearing that Burbank ever got a copy of this report.

2018-19 SCHOOL YEAR

Bianca Gallardo was one of Student's preschool teachers at Disney beginning in August 2018. She had a bachelor's degree and no teaching credential. She had no training working with children with special needs. Ms. Gallardo was not familiar with the term "typically developing" to describe children or the classmates/peers of a student with disabilities. In her classroom, Student had a full time one-to-one aide, from B.I.G. Parents dropped off Student between 7:00 AM and 9:00 AM. Teacher-initiated activities occurred until 9:00 AM, then handwashing and toileting, then snack outside, then circle time, then rotations through table activities, then another handwash and toileting, followed by lunch at 11:00 AM then music or story time, a nap at 12:15 PM, and the day ended around 2:15 PM. His one-to-one aide was with him constantly except for one 10-minute break.

Ms. Ibarra generated monthly reports. The reports for September, October, and November 2018 indicated Disney used a preschool curriculum called "Learning Foundations." In September 2018, the curriculum consisted of group participation, alphabet and word recognition, observation and investigation of various materials, exploration of music with singing and instruments, basic prepositions, physical development, and "physical sciences" such as observations and descriptions of the movement of objects. The September report indicated Student was exploring the new classroom environment, greeting the teacher with a "hi" and a high five, putting toys away with prompting and sometimes without prompting, listening to stories, and dancing. Adults encouraged him to join the group. Student was also exploring and playing with classroom materials. He enjoyed stacking blocks, looking at books, and playing with sensory materials like sand. Student imitated a teacher using a magnifying glass to look at objects and did so on his own. With support, he spelled the word Bingo. Photographs showed Student playing and compliant, although alone, but in close

proximity to others, which he was able to tolerate. Ms. Gallardo believed he imitated the compliant behavior of other children.

In October, the curriculum comprised fine motor skills, cooperative play, recitation of numbers, further alphabet and word recognition, maintenance of attention, fine motor and sense development, and visual arts. The report showed Student stacked puzzle pieces and responded to questions concerning numbers, and pointed to letters of a board and correctly named them. In terms of social interaction, he joined other children in a circle while they danced to a song and walked over to another student to look at her book. With prompting, he asked the other student if he could see the book and looked at it when she said yes. He explored sensory materials and textures, and painted with watercolors. Except for the dance and the book exchange, photos showed him working alone, compliant.

In November, the curriculum comprised further observation and investigation of objects, prepositions, movement skills, the concept of change, and visual arts. The report showed him exploring textures and making art, but still alone.

The evidence did not establish how, if at all, the preschool curriculum at Disney differed from a public school preschool curriculum either in general education or in special education. Ms. Sotodeh opined that general education and special education preschool curriculum worked on the same skills, but there were more visuals and strategies used in special education.

Some of the class activities were self-directed by the students' own exploration, and others were teacher-led activities. Student sat with his peers and, at the time of hearing, asked peers to share toys with him. Student was not engaging with peers by his own choice, yet. He was still learning how to interact with others. His social interactions were encouraged and facilitated by Ms. Gallardo and Student's aide. Student's social interactions were, as Ms. Gallardo testified, "more us doing the encouraging." Student's

one-to-one aide supported his tabletop activity, explorations, and communication with other children, using B.I.G.'s set of behavioral goals. The aide, for example, asked Student if he wanted a toy, and if he said yes, the aide modeled how to ask for the toy. His present levels of performance in her classroom were singing along during circle time, mimicking hand gestures during circle time songs, and sitting with his peers. He needed one or two reminders to go to the toilet but eliminated independently. He washed his hands with prompting. He sat with his peers while eating lunch. He said "all done" to indicate when he finished something. He asked for the food items he preferred. He threw away his trash on his own, took out his bed for naps on his own, and took off and put his shoes where they belonged before nap time. Academically, he knew numbers and letters, both upper and lower case, and was working on spelling his name. In these skills, Student was on target for Ms. Gallardo's classroom and age group.

JANUARY 10, 2019 IEP

On January 10, 2019, Burbank convened another IEP team meeting.

Prior to the January 10, 2019 IEP, Mr. Concidine took Mother on a tour of Burbank's SEED classes. They viewed morning and afternoon classes and also the day care program at the Horace Mann site. According to Mr. Concidine, Burbank was offering mainstreaming opportunities there. This possibility was discussed at the January 2019 IEP team meeting, but not officially offered. At that time, there were five morning and five afternoon SEED classes.

The January 2019 IEP document stated the purpose of the meeting was to review the UCLA discharge report Mother had provided to Burbank at the June 2018 IEP. It also stated that the IEP team had met, and that changes were made after the District had time to review and consider the report, and that the changes were sent to Parent in June 2018.

However, the documentary evidence did not bear this statement out. The

changes that Burbank had made to the March 2018 IEP, were made in the June IEP, and occurred after April 17 when Mother sent her letter and attachments, including Ms. Gross's UCLA speech report. The changes were completed by the time of the June 2018 IEP team meeting. Changes Burbank made prior to the June 2018 IEP were presented to Mother at the June IEP team meeting. At the June IEP team meeting, Mother presented Burbank with the UCLA discharge report. Thereafter, between the June 2018 IEP team meeting and the January 2019 IEP team meeting, no new goals were written. No new drafts were sent to Mother.

The January 2019 IEP made no changes to the offer of a FAPE that had been made in June 2018.

At the January 2019 IEP team meeting, the IEP team discussed parent concerns. Burbank asked for and received permission to observe Student at Disney.

Burbank offered Mother another augmentative and alternative communication assessment at the January 2019 IEP team meeting. In the January 2019 time frame, Mother said it was no longer a concern because Student was at that time working on verbal language.

OBSERVATION AT DISNEY

In late January or early February 2019, after the January IEP, Burbank staff members observed Student at Disney. Ms. Riven and Ms. Anderson went on one day. Ms. Michalopoulos and Ms. Chaja went on another day. Ms. Riven and Ms. Anderson spoke to the Disney teacher and observed Student in that setting, working with his one-to-one aide. Ms. Riven also interviewed the one-to-one aide, who expressed that Student was able to label more items and was starting to express his wants and needs. Student did not participate with the group. For peer interactions, he required adult prompting. Ms. Riven observed Student engaging in a lot of repetitive play. He was not using a lot of language. She did not see him interacting with his peers. She saw a high

level of prompting by his aide the entire time. Ms. Anderson saw him playing, but not with another peer. He was not interacting with the other students. Ms. Anderson felt that SEED would be a more appropriate setting because of its structure and embedded sensory strategies. These can be used to facilitate peer interactions and appeared to her to be more appropriate for Student. On the day Ms. Michalopoulos and Ms. Chaja observed Student at Disney, Ms. Michalopoulos did not see him engaging with peers. He required a high degree of repeated prompting from his one-to-one aide for most activities. He often did not respond. Ms. Chaja's view was that Disney was at the opposite end of the continuum from UCLA. It had a larger group of Students, and she did not observe the Disney teacher giving Student any direct instruction. Student received all his direct attention only from his aide. Ms. Chaja witnessed no peer interaction while she was there.

FEBRUARY 14, 2019 IEP

On February 14, 2019, Burbank convened an IEP team meeting to make its offer of FAPE for the 2019-2020 school year.

The draft document noted Parents' concerns. It listed pre-academic, academic, and functional skills; strengths and weaknesses in communication; gross and fine motor skills; social-emotional and behavioral skills; vocational skills; adaptive skills; and other areas. It reflected the results of the observations at Disney.

It stated that for Student to receive educational benefit, goals would address Student's attention, following directions, behavior and task completion, expressive language, group participation, play and social skills, and gross motor functioning. The IEP "special factors page" indicated Student did require assistive technology. It continued to state that his behavior did not impede his learning or the learning of others. The IEP proposed nine goals. The goals were modified from the June 2018 IEP but covered the same areas of need and used most of the same language. In goal two

for following directions and receptive language, Student would be asked to follow five two-step directions, whereas the previous goal was to follow 15 one-step directions. Burbank made minor changes in other goals to the number of minutes Student would be asked to perform tasks, and the number of prompts he would be given. There was one new goal, numbered as goal four, in expressive language that related to labelling objects, that was not in the June 2018 IEP. The new goal four replaced the prior goal four in object identification. Goal six in expressive language replaced the prior goal seven, now aiming at phrases rather than utterances, and discontinuing the use of an augmentative and alternative communication device. The June 2018 version and current goal three were labelled as "behavior task completion." This goal related to completing new or non-preferred tasks. There was no other behavior goal, as had been the case in the June 2018 IEP. The baselines all referred to what the assessors had observed at Disney.

The IEP did not mention or address the UCLA discharge report's numerous proposed goals.

Burbank continued to offer SEED for two- and one-half hours a day. Burbank offered occupational therapy for two 30-minute sessions, one individual and one group, the same as had been offered in the initial March 2018 IEP and in June 2018. However, in February 2019, Burbank specified that the "group" would consist of one other child only. Physical therapy was offered and is not in dispute. Burbank offered the same speech therapy services as before, two sessions a week of 30 minutes each, one individual and one group. Behavior intervention services were offered for the same amount of time as previously, two hours per week of individual service, again to "focus on IEP goals." As in the June 2018 IEP, the services in the February 2019 IEP were to be provided outside of Student's school day, and again the "separate classroom" box was checked.

There was a significant change in the offer of mainstreaming. Although the February 2019 IEP continued to state the percentage of 85 percent of time in special education and 15 percent in the regular class, the 15 percent in this IEP changed from the previous contemplation of reverse mainstreaming. Here Student was offered mainstreaming opportunities at Horace Mann Children's Center. Specifically, he was offered "up to four hours daily or during childcare hours when parents are able to pick up."

Now that "up to four hours" of mainstreaming was being offered, it was not clear when the two hours of behavioral intervention services would be provided, especially because it was to be provided "outside of Student's school day." Mr. Concidine at hearing opined that the two hours of behavior services would have been provided during the general education portion of Student's school day. However, Mr. Concidine acknowledged that it could be otherwise interpreted because the box was checked stating that it would, instead, be in a "separate," meaning special education, classroom.

The mainstreaming offer of up to four hours was intended to provide Mother with flexibility as to when to pick up Student. Thus the "up to four hours" was not specified. The amount of time in the general education setting would have depended on whether the SEED class was in the morning or afternoon, and this was not yet specified.

If the SEED class were in the morning, it would have been held from 8:30 to 11:00 AM. Then, because the general education preschool ran until 12:30 PM, Student would have been mainstreamed from 11:00 AM to 12:30 PM, and then he would have gone to daycare until a parent fetched him. If Student were to attend the afternoon SEED program, it would have begun at noon, and he could have attended the entire morning general education preschool session. However, the offer of aide services was for two hours only.

Burbank again offered extended school year four days a week from June 3 to July

3, 2019, which witnesses described as totaling 19-20 school days. Mr. Concidine could not recall any instance of extended school year being offered for more than 19 or 20 days and did not recall the length of summer services being discussed.

Burbank offered the same accommodations and supports as before. Burbank again offered "closer supervision" during unstructured and outside activities.

PARENTS' EXPENDITURES FOR DISNEY

For the period from the UCLA discharge date of May 2018 through June 11, 2018, Mother paid Disney \$326 per week tuition. From June 11, 2018, through May 10, 2019, Parents paid Disney a total sum of \$15,622.00 for tuition. For the period after May 10, 2019, through the date of this Decision, Mother estimated ongoing tuition expenditures would be \$326 per week. Student attended five days a week. For two days each week, Parents' travel round trip from home, based on 4.5 miles each way, was 9 miles a day. For three days a week, Parents' travel one way each day was 4.5 miles. Thereafter they traveled to and from Ms. Phillips' speech therapy sessions.

LEGAL CONCLUSIONS

INTRODUCTION – USE OF LEGAL CONCEPTS THROUGHOUT THE DECISION

In this discussion, unless otherwise indicated, this introduction's legal citations are incorporated into each issue's conclusion. All references to the Code of Federal Regulations are to the 2006 version.

LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. §1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The Individuals with Disabilities Education Act is often referred to as the "IDEA." The main

purposes of the IDEA are:

1. to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
2. to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. §1400(d)(1); see Ed. Code, §56000, subd. (a).)

A free appropriate public education, often called a FAPE, means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's Individualized Education Program, commonly called an IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective or supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

In general, an IEP is a written statement that is developed by parents and school personnel using the IDEA's procedures. The IEP describes the child's present levels of performance, needs, and academic and functional goals related to those needs. It also provides a statement of the special education; related services, which include transportation and other supportive services; and program modifications and accommodations that will be provided for the child to work towards the stated goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14) and (26), 1414(d)(1)(A); Ed. Code, §§ 56031, 56032, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.17, 300.34, 300.39 Cal. Code Regs., tit. 5, § 3001, subd. (p).)

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the IDEA consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

In *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000] (*Endrew F.*), the Supreme Court held that a child’s “educational program must be appropriately ambitious in light of his circumstances.” “Every child should have a chance to meet challenging objectives.” (*Ibid.*) *Endrew F.* explained that “this standard is markedly more demanding than the ‘merely more than de minimis’ test The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at pp. 1000-1001.) The Court noted that “any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” (*Id.* at p.999.) However, the Supreme Court did not define a new FAPE standard in *Endrew F.* The Court acknowledged that Congress had not materially changed the statutory definition of a FAPE since *Rowley* was decided and so declined to change the definition itself. The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

The IDEA affords parents and local educational agencies the procedural

protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Generally, a party is limited to filing a request for due process two years from the date the person knew or should have known of the facts which form the basis for the request for a due process hearing.

At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); see 20 U.S.C. §1415(i)(2)(C)(iii).) Here, Student requested the hearing in Student's Case, and therefore has the burden of proof on the issues Student presented. Burbank requested the hearing in Burbank's Case, and therefore has the burden of proof on the issue Burbank presented.

STUDENT'S ISSUE 1: FUNCTIONAL BEHAVIOR ASSESSMENT

Student contends Burbank denied him a FAPE by failing to conduct a functional behavior assessment from March 2018 through the filing of Student's first amended complaint on January 14, 2019. Specifically, Student contends Burbank's IEP offers inappropriately determined Student did not have any behaviors that were impeding his learning or that of others, despite information to the contrary, for which behaviors Student should have been given a functional behavior assessment. Burbank contends functional behavior analyses must be conducted in the pertinent setting, and that since Student never enrolled in a Burbank program, that setting never materialized. Second, Burbank contends Student's behaviors at Disney and UCLA were mildly off task, which would have been addressed by the structure of the SEED program they offered. Third, Burbank contends any safety concerns were adequately addressed by its offer of

closer supervision and did not require a functional behavioral assessment.

A local educational agency must assess a special education student in all areas of suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) A local educational agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. (20 U.S.C. § 1414(b)(2)(A).) No single measure or assessment shall be the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) The assessments used must be:

- selected and administered so as not to be discriminatory on a racial or cultural basis;
- provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally;
- used for purposes for which the assessments are valid and reliable;
- administered by trained and knowledgeable personnel; and
- administered in accordance with any instructions provided by the producer of such assessments.

(20 U.S.C. § 1414(b); Ed. Code, § 56320, subds. (a) & (b).)

Individuals who are both “knowledgeable of the student’s disability” and competent to perform the assessment, must conduct assessments of students’ suspected disabilities. (Ed. Code §§ 56320, subd. (g); 56322; see 20 U.S.C. § 1414(b)(3)(A)(iv).) The determination of what tests are required is made based on information known at the time. (See *Vasherese v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not

including speech/language testing where concern prompting assessment was deficit in reading skills].)

Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304(c)(6).) The local educational agency must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical, and developmental factors have on the functioning of the student. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) A school district is required to use those assessment tools necessary to gather relevant functional and developmental information about the child to assist in determining the content of the child's IEP. (34 C.F.R. § 300.304(b).)

A school district's failure to conduct appropriate assessments, or to assess in all areas of suspected disability, may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031-1032.)

The failure to obtain critical assessment information about a student renders the accomplishment of the IDEA's goals, and the achievement of a FAPE, "impossible." (*NB. v. Hellgate Elementary School District* (9th Cir. 2008) 541 F.3d 1202, 1210 (quoting *Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 894); *Timothy O. v. Paso Robles Unified School District* (9th Cir. 2016) 822 F.3d 1105.)

The educational benefit to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical, and vocational needs. (*Seattle School District No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.)

If a child's behavior interferes with his or her learning or the learning of others, the IDEA requires that the IEP team, in developing the IEP, "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) A behavior intervention is the systematic implementation of procedures that result in lasting positive changes in the individual's behavior. Children with disabilities who exhibit serious behavioral challenges are entitled to timely behavioral assessments as well as development and implementation of positive behavioral interventions and supports. (20 U.S.C. § 1400(c)(5)(F); Ed. Code § 56520, subd. (b).)

IEP teams must consider and include appropriate behavioral goals and objectives and other appropriate services and supports in the IEPs of children whose behavior impedes their own learning or the learning of their peers. A district's failure to develop positive behavior interventions can amount to a denial of FAPE. (See, e.g. *Neosho R-V School District v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-29 [lack of a cohesive behavior plan outweighed any slight academic benefit the student received, which was lost because of ongoing behavior problems that interfered with his ability to learn]; *C.F. ex rel. R.F. v. New York City Department of Education* (2d Cir. 2014) 746 F.3d 68.)

Student did not prove Burbank denied him a FAPE by failing to conduct a functional behavioral assessment from March 2018 through the filing of Student's first amended complaint on January 14, 2019. A functional behavioral assessment was not warranted nor "technically sound," as the law requires, for the simple reason that Student was not in a Burbank placement in which his behaviors could be observed and assessed. Ms. Chaja persuasively testified to that effect. Her opinion was bolstered by the fact that UCLA, whose program and assessors were indisputably excellent, did not assess Student's functional behavior prior to his becoming enrolled in their program. If a functional behavioral assessment had been warranted by Student's profile prior to

placement there, UCLA would most assuredly have conducted one. They did not, as Burbank did not, even though both UCLA and Burbank were aware of the same information about Student when they both assessed him in February 2018 within days of each other.

The evidence established that it cannot reasonably be discerned, prior to attending a placement, whether a particular student will or will not exhibit behaviors there that require intervention, nor what the function of those behaviors will be, nor what interventions will be required. For this reason, UCLA's discharge report stated its behavioral interventions after their functional behavioral assessment were "specific to the [partial hospitalization program] classroom and therapy sessions." Burbank's failure to conduct a functional behavior assessment until Student was in a specific Burbank program and Burbank personnel could see how he functioned there, did not deny Student a FAPE. Burbank prevails on Issue 1.

STUDENT'S ISSUE 2: SPEECH AND LANGUAGE AND AUGMENTATIVE AND ALTERNATIVE COMMUNICATION ASSESSMENT

Student contends Burbank denied him a FAPE by failing to comply with all legal requirements regarding Burbank's March 2018 assessments in the area of speech and language, including augmentative and alternative communication. Specifically, Student contends that at the time of the March 2018 assessment, Student had no adequate means of communication, but Burbank's speech and language assessment failed to appropriately address that by investigating augmentative and alternative communication. Burbank contends its assessment was appropriate.

"Assistive technology device," means any item, piece of equipment, or product system, whether acquired commercially without the need for modification, modified, or customized, that is used to increase, maintain, or improve functional capabilities of an individual with exceptional needs. (20 U.S.C. § 1401 (1); Ed. Code, §56020.5.) When

developing an IEP, the IEP team must consider whether the pupil requires assistive technology devices and services. (Ed. Code, § 56341.1(b)(5).)

This issue pertains to the time frame of the February 2018 assessment only, and the March 2018 IEP. It is undisputed that by April 2018, Burbank was in possession of Ms. Gross's UCLA speech report that was attached to Mother's April 17, 2018 letter. The letter specifically requested augmentative and alternative communication. By the time of the June 2018 IEP, Burbank had responded appropriately by offering Student an augmentative and alternative communication assessment, which Mother declined, and had offered augmentative and alternative communication devices and services in the June 2018 IEP offer. Thus, the time frame of this issue is prior to those events.

Student did not prove Burbank denied him a FAPE by failing to conduct an augmentative and alternative communication assessment during the initial assessment. In and prior to February 2018, Burbank was not on notice of Student's use of assistive technology. Student argued Burbank should have observed Student at Disney and been aware of Student's use of picture icons and an iPad in Ms. McNulty's classroom prior to February 2018. However, Ms. Chaja at hearing credibly defended the fact that Burbank did not in its assessment include observation of Student's then-current program, which was in flux. It would not have been reasonable for Burbank to observe Student at Disney prior to Burbank's first meeting with Mother, and by then he was transitioning into UCLA.

Student and Parent brought no assistive technology devices with them to the Burbank assessment and did not mention it to Burbank assessors. Thus, Burbank was not on notice of Student's then-current use of augmentative and alternative communication.

It is true that Burbank was in possession of the B.I.G. January 31, 2018 progress report, which noted Student used a communication system that included gestures,

pictures and icons, and some verbal output. Student argues that this information, and Student's nonverbal presentation, warranted an augmentative and alternative communication assessment in February 2018. The argument is not persuasive. As with the functional behavior assessment, the most persuasive evidence is what UCLA did. UCLA did not initially assess Student using augmentative and alternative communication prior to his becoming enrolled in their program. If an augmentative and alternative communication assessment had been warranted by Student's profile prior to placement there, UCLA would have conducted one. UCLA and Burbank were aware of the same information about Student prior to their virtually contemporaneous assessments. The ALJ infers that, as with functional behavior, it was unclear prior to attending a placement whether Student would or would not develop spontaneous speech in the setting. Therefore, UCLA did not conduct its augmentative and alternative communication assessment until Student was already in its program, and the staff saw how he functioned there. Student did not establish that Burbank's lack of an augmentative and alternative communication assessment constituted a denial of FAPE. Burbank prevails on Issue 2.

STUDENT'S ISSUES REGARDING FAILURE TO CONSIDER INFORMATION AND PREDETERMINATION

In several Issues and sub-issues, numbered as 3.a.i.(1), 3.b.i.(1), 3.c.i.(1), 3.a.i.(4)a., 3.b.i.(4) a., 3.c.i.(4) a., 3.a.i.(6), 3.b.i.(6), 3.c.i.(6), 3.a.i.(7), 3.b.i.(7), 3.c.i.(7), 3.a.ii., 3.b.ii., and 3.c.ii., Student contends, for each of the three IEPs at issue in Student's case, that Burbank denied Student a FAPE by failing to:

- consider the concerns of Parents for enhancing the education of Student;
- consider the use of positive behavioral interventions, supports, and strategies to address behaviors impeding Student's learning or that of others;
- consider whether the nature or severity of Student's disability was such that

education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily;

- consider the full continuum of placement options available, including placement in a typical preschool setting; and
- by predetermining its offers of placement and services.

More specifically, Student contends that despite Parents providing information and recommendations that Student could be educated in a general education program with appropriate supports, Burbank did not take the information into account and continuously ignored it. Student contends that Burbank never had any "intention" of offering any program other than SEED. Student contends Parents were denied meaningful participation in the IEP process as a result, and that Student was denied educational opportunities. Burbank contends it considered all the available information in making its offers of FAPE.

In developing an IEP, the IEP team shall consider the concerns of parents for enhancing the education of their child. (20 USC § 1414(d)(3)(A)(ii), 34 C.F.R. § 300.324(a)(ii); Ed. Code, § 56341.1, subd. (a)(2).) The IEP team shall, among other things:

- consider the concerns of the parents or guardians for enhancing the education of the pupil (Ed. Code, § 56341.1, subd. (2));
- consider the results of the initial assessment or most recent assessment of the pupil (Ed. Code, § 56341.1, subd. (3); see also (34 C.F.R. § 300.324(a)(1)(iii) (The IEP team must consider the assessments in determining the child's educational program.)); and
- in the case of a pupil whose behavior impedes his or her learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior (Ed. Code, § 56341.1, subd. (4)(b)(1)).

The parents of a child with a disability must be afforded an opportunity to

participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. (34 C.F.R. § 300.501(b).) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP team meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693-5; *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

In the event of a procedural violation, a denial of FAPE may only be found if that procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

An education agency's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*W.G. v. Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 84; *Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F.3d 840, 857-58.) Predetermination occurs when an educational agency has made its determination prior to the IEP team meeting, and is unwilling to consider other alternatives. (*Ms. S. ex rel G. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131 ["A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, then simply presents the IEP to the parent for ratification."].)

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not

required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is "a snapshot, not a retrospective." (*Ibid.* citing *Fuhrmann v. East Hanover Board of Education, supra*, 993 F.2d at 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

Each public agency must ensure extended school year services are available as necessary to provide FAPE. In implementing the requirements of this section, a public agency may not unilaterally limit the type, amount, or duration of those services. (34 C.F.R. § 300.106 (a).)

With the exception of extended school year services, which are discussed below, Student offered no persuasive evidence that Burbank team members failed to consider what Mother said, nor predetermined Student's program for any of the three IEPs in question. On the contrary, the parties offered significant evidence that Parents meaningfully participated in the development of all three IEPs. Each IEP noted very extensive discussion, including private providers and an advocate at the June IEP, who clearly voiced disagreement over Student's needs. The fact that Burbank's offers did not align with what Parents wanted did not establish that Burbank failed to consider Parents' perspectives. Parents asked questions, shared observations, sought additional information, requested changes to the IEP, and submitted their concerns to Burbank in writing at and after the IEP team meetings. Some of Parents' requested changes were made to the initial, March 2018 IEP, and then between the March and June 2018 IEPs. For example, in March, Burbank offered "closer supervision" to address Mother's concerns for Student's safety. In June, Burbank offered an augmentative and alternative communication assessment and trial device, edited proposed goals, and added new

proposed goals, all in response to Mother's April 17, 2018 letter with attachments. Burbank's disagreement with Parents does not establish that Burbank failed to consider Parents' requests, or predetermined Student's program. Predetermination does not refer to disagreement after discussion, but to the lack of meaningful discussion itself. Here, although Parents disagreed, Burbank engaged in meaningful discussions with them. In sum, Student failed to meet his burden on proof with respect to Issues 3.a.i.(1), 3.b.i.(1), 3.c.i.(1), 3.a.i.(4) a., 3.b.i.(4) a., 3.c.i.(4) a., 3.a.i.(6), 3.b.i.(6), 3.c.i.(6), 3.a.i.(7), 3.b.i.(7), and 3.c.i.(7).

However, with regard to Issues 3.a.ii., 3.b.ii., and 3.c.ii., concerning predetermination, the evidence did establish that insofar as the offer of extended school year services was concerned, Burbank's offers were predetermined. Ms. Chaja at hearing gave unpersuasive and unsatisfying testimony about how the amount of extended school year offer in the March 2018 IEP was determined to be sufficient to prevent regression. She did not readily acknowledge that extended school year, like other special education and related services, should be individualized, and simply stated that this amount of services was what Burbank offered to all children who qualify for extended school year. Ms. Michalopoulos at hearing recalled that Mother, at the March 2018 IEP team meeting, expressed her concern about the time gap between the regular school year and extended school year. Ms. Michalopoulos could not recall if Burbank responded to that concern, but she unconvincingly opined that Student "did not have a history of regression of skills." Ms. Anderson could not recall the team discussing any offer of extended school year beyond the "typical" extended school year period. None of this testimony was persuasive that the offer of extended school year was individualized to Student's needs.

In her April 17, 2018 letter, Mother again expressed concern about the gap of time during breaks before and after extended school year, and asked for a year-round

continuous program with no breaks in service, as opposed to the 19-day extended school year period. At the June 2018 IEP, Burbank rejected Parent's request. At the June 2018 IEP, as in March, Burbank's offer of extended school year continued to be four days a week from June 3 to July 3, 2018 or for 19-20 days. At hearing, Mr. Concidine could not recall any instance of extended school year ever being offered for more than 19 or 20 days and did not recall this being discussed.

In the UCLA discharge report Burbank received in June 2018, UCLA stated that it was "critical" that Student receive services for the entire year from the date of discharge to minimize transitions, prevent regression, and continue to improve and maintain his skills. Burbank never responded to this information. The January 2019 IEP made no changes to the June offer and considered no additional information concerning extended school year.

In sum, Student prevails on Issues 3.a.ii., 3.b.ii., and 3.c.ii., concerning predetermination. Burbank predetermined its offers of placement and services throughout the three IEPs with regard to extended school year.

STUDENT'S ISSUES CONCERNING CONSIDERATION OF OUTSIDE ASSESSMENTS AT EACH OF THE THREE IEP TEAM MEETINGS

Student contends, for each of the three IEPs at issue, Burbank failed to consider the assessments and reports of Student's private providers. Burbank contends it considered all the reports of which it was made aware.

If a parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. (34 C.F.R. § 300.502 (c)(1).)

As of the March 2018 IEP, Ms. Chaja had reviewed the reports Burbank had been

given at the time. She listed these in her assessment report. Although Ms. Riven could not recall exactly what documents she had reviewed when, Student did not establish that as of the March 2018 IEP Student had provided any documents Burbank failed to consider. Prior to the February 2018 assessment, Burbank reviewed the documents it had been given. Mother brought with her to the March 2018 IEP an additional document, a Developmental Assessment dated January 2018. Ms. Chaja established at hearing that she was aware of the report and of the discrepancy between its cognitive estimate of 23 months and her own estimate that Student was at the 12- to 18-month range cognitively. Thus, before and at the March 2018 IEP, Burbank considered all the outside reports it had been given. For these reasons Burbank prevails on Issue 3.a.i.(2).

Similarly, prior to and at the June 2018 IEP team meeting, Burbank reviewed whatever Parent provided. Burbank reviewed and responded to Mother's April 17, 2018 letter and attachments, including Ms. Gross's UCLA speech report. Burbank drafted new proposed goals and generated an augmentative and alternative communication assessment plan and trial device in response. For these reasons Burbank prevails on Issue 3.b.i.(2).

However, Student prevails with regard to Issue 3.c.i.(2), concerning the reports Burbank failed to review prior to and in preparation for the January 2019 IEP. The evidence established Burbank never reviewed the UCLA discharge report after Parent submitted it at the June 2018 IEP team meeting. As of the June 2018 IEP, Burbank had received a copy of the report. Although some of the witnesses recalled a meeting to discuss the report and revise goals based on it, the documentary evidence did not corroborate this recollection. No new goals were written after the June 2018 IEP. Thus, the witnesses were confused as to the timing of their meeting, and which UCLA document they reviewed. They did not meet after the June 2018 IEP team meeting to review the final UCLA discharge report that they received at the June 2018 IEP team

meeting. Despite their contrary recollection, they did not re-draft any proposed goals based on it. The UCLA discharge report's final recommendations were for the six months to one year after Student left the UCLA program in May 2018. Thus, they remained pertinent for the entire time frame between June 2018 and the January 2019 IEPs, and should have been addressed. UCLA proposed extensive and detailed goals. Burbank never tried to incorporate these into any offer of FAPE. This failure to consider a very important document likely caused Student a significant deprivation of educational benefits.

For these reasons, Student prevails on Issue 3.c.i.(2), for Burbank's failure to consider the results of outside assessments at the January 2019 IEP team meeting.

STUDENT'S ISSUES REGARDING FAILURE TO INCLUDE REQUIRED CONTENT

Student contends that the IEPs dated March 13, 2018, June 6, 2018, and January 10, 2019, failed to include all required content, specifically:

- a sufficient statement of Student's present levels of academic achievement and functional performance;
- measurable annual goals in any area of need;
- and special education and related services based upon peer reviewed research to the extent practicable, (with the exception of physical therapy which is not in dispute);
- include a statement of the intervention, accommodation, or program modifications Student required to address his behaviors;
- and include a statement of assistive technology devices or services Student required to receive a FAPE.

Burbank contends the IEPs contained all required content.

An IEP is a written statement that includes the student's present levels of academic achievement and functional performance, including the manner in which the

student's disability affects the student's involvement and progress in the general education curriculum. (Ed. Code, § 56345, subd. (a)(1).) An IEP must also contain a statement of measurable annual goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general curriculum, and to meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).) An IEP must include services, supplementary aids, modifications, or supports that will allow the student to advance appropriately toward attaining the annual goals, and to be educated and participate with other students with disabilities and those who do not have disabilities. (20 U.S.C. § 1414(d)(1)(A)(IV); Ed. Code, § 56345, subd. (a)(4).) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student to enable the student to advance toward attaining the annual goals, and to be involved in and make progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications; and, the anticipated frequency, location and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) Only the information set forth in title 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code, § 56345, subds. (h) & (i).)

Education Code section 56345, subdivision (a)(1)(B) also requires that for

preschool children, the IEP state, as appropriate, the manner in which the disability affects his or her participation in appropriate activities.

This is a solely procedural claim regarding whether the IEPs included certain legally required content. The analysis for these sub-issues does not concern whether the content provided a substantive FAPE. Student failed to meet his burden of proof as to the required content in each of the IEPs at issue. The March and June 2018 IEPs, the contents of which were attributed also to the notes of the addendum meeting in January 2019, stated present levels of pre-academic achievement, academic achievement, and functional performance. They contained measurable annual goals and stated the relationship between the present levels of performance, the goals, and the educational services. They contained statements of how the goals would be measured. They stated the special education and related services that would be provided, with a projected start date for services and modifications. They stated the anticipated frequency, location and duration of services and modifications. The law provides that “only the information set forth in 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP, and the required information need only be set forth once.” Burbank complied. Burbank prevails on Issues 3.a.i.(3)a., 3.b.i.(3)a., 3.c.i.(3)a., 3.a.i.(4)b., 3.b.i.(4) b., 3.c.i.(4)b., 3.a.i.(5), 3.b.i.(5), and 3.c.i.(5), concerning whether the IEPs included required content.

STUDENT’S ISSUES CONCERNING FAILURE TO MAKE A CLEAR WRITTEN OFFER

Student’s complaint clearly stated a claim for a failure to make a clear written offer of FAPE in each of the three IEPs. Student’s PHC statement also stated this claim. This claim was discussed at the PHC and never withdrawn. This claim was inadvertently omitted from the PHC Order, however extensive evidence pertaining to this claim was taken at hearing without objection. (See *M.C. v. Antelope Valley Union High School District, supra*, 858 F.3d 1189, 1196.) Therefore, the claim is addressed here.

District, supra, 858 F.3d 1189, 1196.) Therefore, the claim is addressed here.

The IEP is a “formal, written offer [that] creates a clear record that will do much to eliminate troublesome factual disputes . . . about when placements were offered, what placements were offered, and what additional education assistance was offered to supplement a placement, if any.” (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) The IEP must specify “the anticipated frequency, location, and duration of [education] services.” (20 U.S.C § 1414(d)(1)(A)(i)(VII).) Such “a formal, specific offer from a school district will greatly assist parents in ‘present[ing] complaints with respect to any matter relating to the . . . educational placement of the child.’” (*Union School District v. Smith, supra*, 15 F.3d 1519, 1526 (quoting 20 U.S.C. § 1415(b)(1)(E)).)

The March 2018 IEPs offer of placement in the early development program was unclear. It was unclear how many such classes there were and how many students each class generally contained. It was unclear whether Burbank a morning or afternoon class. It was unclear whether the class into which Burbank proposed to place Student would be autism-specific, or dedicated to students with intellectual disabilities teaching functional life skills, or would teach academics and pre-academics. It was unclear how Burbank, or Burbank and Parents together, would determine the specific class into which Student would be placed. It was unclear what developmental differences or age ranges would be in the class.

It was unclear how the 15 percent of the time in general education, which really meant no time in general education, would work in terms of reverse mainstreaming. Because the general education preschool only had morning classes, but SEED had both morning and afternoon classes, there could only be interaction between general and special education students in the morning. Burbank’s witnesses were vague in their understanding as to how the reverse mainstreaming was to be implemented, especially because it was not clear whether Burbank proposed Student would attend SEED in the

morning or the afternoon. The degree, type, location and timing of interaction, if any, with general education preschoolers was not specified.

For related services, Burbank offered behavior intervention services of 30 minutes each day of individual support, during the school day, to work on Student's IEP goals. Confusingly, the total number of days of this service was four days a week for a total of 120 minutes whereas the SEED classes ran five days a week. The manner in which this service would be implemented was unclear, as was its relationship if any with the reverse mainstreaming. The specific qualification of the person to provide this service was not noted. The IEP had no behavior support plan and no behavior goals. Thus, it was not clear what the offer of behavior intervention services of 30 minutes for four days of individual support was intended to accomplish.

For supplementary aids and services and other supports, the IEP offered "closer supervision during unstructured and outside activities." It was unclear what this meant, who would provide it, and how it was to be implemented. The offer's lack of specificity significantly impeded the Parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE.

The lack of clarity carried over into the June 2018 IEP and the January 2019 addendum, neither of which made changes to the March 2018 offer regarding placement. Burbank continued to offer placement in the SEED program, with the same ambiguities as before. In the June 2018 IEP, Burbank took the position that it "will not define the size of the classroom in the IEP."

For related services, Burbank revised the March 2018 offer of behavior intervention services. The March 2018 IEP had offered 30 minutes four times per week, totaling 120 minutes, of individual support, to work on IEP goals, and to be provided during the school day. The June IEP revision had the same 120 minutes weekly but organized differently. Instead of 30 minutes four times a week, and during the school

day, Burbank revised the offer to 60 minutes two times a week, outside the school day. The reasons for this revision were not explained. However, the offer still indicated that the service would be provided within the SEED classroom. As before, the manner in which this service would have been implemented was unclear. The qualifications of the person to provide this service was not noted. The IEP continued to have no behavior support plan. There were no new behavior goals. Thus, it continued to be unclear what the offer of behavior intervention services was intended to accomplish. The offers' lack of specificity significantly impeded Parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE.

In conclusion, Student prevailed on the Issues that have been numbered in this Decision as 3.a.i.(3)b., 3.b.i.(3)b., and 3.c.i.(3)b., for failure to make a clear written offer.

STUDENT'S ISSUE 4: PRIOR WRITTEN NOTICE

Student contends Burbank denied him a FAPE by failing to provide legally compliant prior written notices after his IEPs regarding Burbank's refusal to offer placement in a general education setting; a one-to-one aide for the full school day and outside the school day for 30 hours per week; and related services at the requested frequency and duration in speech and language and occupational therapies. Burbank contends its prior written notices were sufficient.

A parent must be provided "written prior notice" when a school district proposes, or refuses, to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3); Ed. Code, § 56500.4.) The notice must include a description of the action proposed or refused by the school district, an explanation of why the district proposes or refuses to take the action, a description of each evaluation procedure, test, record, or report used as a basis for the proposed or refused action, a description of any other factors relevant to the district's proposal or refusal, a statement that the parents have protection under the procedural

safeguards of IDEA, and sources for the parents to contact to obtain assistance. (20 U.S.C. § 1415(c); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4.)

Student failed to meet his burden of proving a denial of FAPE based on Burbank's prior written notices. On May 9, 2018, in response to Mother's ten-day notice of intent to unilaterally place Student at Disney, Burbank's prior written notice declined to reimburse for the Disney placement, and reiterated the March 13, 2018 IEP offer of related services. Thus, the prior written notice addressed the refusal to offer placement in a general education setting with a one-to-one aide. It reiterated Burbank's offered frequency and duration of speech and language and occupational therapy services. It contained all legally required content concerning the basis for Burbank's refusal and concerning parental rights.

At the June 2018 IEP, Burbank declined these same requests and gave notice in the IEP notes. The June IEP notes served as sufficient notice that Burbank declined Parent's requests, particularly the request for three hours a week of speech and language services during the school year. Although the IEP notes did not reiterate all the same legally required content concerning the basis for its refusal and concerning parental rights, this resulted in no denial of FAPE.

Not all procedural errors give rise to the denial of FAPE. If the parents have not been denied the opportunity for meaningful participation and the student has not suffered any loss of educational opportunity, then the student may have received FAPE regardless of procedural violations. Here, Mother was aware of her rights from the previous prior written notice. Also, she was knowledgeably assisted in the June 2018 IEP by an advocate. At the June 2018 IEP, the parties were "digging in" to their respective legal positions stated at this hearing. Mother was well aware of the basis of Burbank's views, and of her own rights and remedies. Student failed to meet his burden of proof on Issue 4.

STUDENT'S ISSUES REGARDING GOALS, BEHAVIOR SUPPORT PLAN, AND RELATED SERVICES IN SPEECH AND LANGUAGE AND OCCUPATIONAL THERAPY

Student contends that the March and June 2018 and January 2019 IEPs denied Student a FAPE by failing to contain appropriate goals, a behavior support plan, and by denying appropriate service levels in the areas of speech and occupational therapy. Burbank contends its offers were appropriate.

Goals

The goals in the March 2018 IEP were based on the assessment data and were appropriate. They addressed Student's needs in the areas of attention, task completion, following directions and receptive language, object identification, group participation and social skills, mobility, and expressive language.

However, there was no behavior goal. The only quasi-behavioral goal was goal two, in the area of following directions and receptive language, to follow eight one-step directions.

The baseline was that Student did not yet follow one-step directions. The baseline also stated concerns about elopement and mouthing non-food items. This goal was ostensibly to address those safety concerns. It did not appropriately do so.

While following eight one-step directions was an ambitious goal to address the baseline of Student not following directions, it was not appropriate to address the other baseline of Student's unsafe behaviors. Student's safety required that he be monitored while trying to attain this goal, or in the event he was unable to do so. The goal did not address Student's current dangers of running into a street, wandering off, or putting non-food items in his mouth. The offer of some behavioral services to work on his IEP goals, and of closer supervision, was intended to address these, but without a behavior goal it was unclear how these services would be implemented, or what they were intended to accomplish, or how progress would be measured. Ms. Chaja explained at

hearing behavioral supports can be “embedded” in a program and that Student’s goals would have directed his teacher how to implement them. Without an appropriate goal, the offer of “embedded” behavioral supports was illusory. Thus, the March 2018 IEP goals lacked an appropriate behavior goal.

This defect carried over into the June 2018 IEP revisions. Although Mother’s concerns did not change, the only revision to goals to address behavior was that in the June 2018 IEP, the title of goal three was revised from “task completion” to “behavior/task completion.” Changing the title did not in and of itself appropriately address safety concerns. Other than modifying the goal about task completion, no changes were made in the area of behavior in the June 2018 IEP.

Although after June 2018 Burbank possessed the UCLA discharge report, no further changes were made to the offer of FAPE in the January 2019 IEP. UCLA’s functional behavior assessment, conducted at or about the time frame of the March 2018 IEP, found that Student exhibited oral stereotypy, meaning that he mouthed non-food objects. Elopement and putting non-food objects in his mouth presented safety concerns. An offer of FAPE must address these. UCLA proposed three behavior goals to address noncompliance and oral and visual stereotypy, or staring too close to objects. These were never addressed in any offer by Burbank. Thus, Student prevailed on Issues 5.a.i., 5.b.i., and 5.c.i., for failure to offer appropriate goals in all areas of need.

Behavior Plans

If a child’s behavior interferes with his or her learning or the learning of others, the IDEA requires that the IEP team, in developing the IEP, “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) A district’s failure to develop positive behavior interventions can amount to a denial of FAPE. (See, e.g., *Neosho R-V School District v. Clark*, *supra*, 315 F.3d at 1028-29; *C.F. ex*

rel. R.F. v. New York City Dept. of Education, supra, 746 F.3d 68.)

For the same reasons that a behavior goal was necessary to address Student's safety, and having such a goal would then drive the services Burbank offered, Burbank also denied Student a FAPE by failing to create a behavior support plan. Ms. Chaja explained at hearing that a behavior support plan is not always needed to provide appropriate behavioral supports, because these can be embedded in a program and driven by appropriate goals, which would have would have directed his teacher how to implement them.

Without either an appropriate behavior goal, or an appropriate behavior support plan, the services and accommodations Burbank put into place were vague. The offer of some behavioral services, and of closer supervision, did not state who would implement it or what that person or people were supposed to guard against.

Although, Student might not require one-to-one behavioral aide services in a structured program and a secured facility like SEED, there still should have been a road map, to all adults on campus, for ensuring Student's safety. The failure to appropriately ensure Student's safety via means of a behavior support plan was a denial of FAPE. Thus, Student prevailed on Issues 5.a.ii., 5.b.ii., and 5.c.ii.

Related Services in Speech and Language

At the time of the March 2018 IEP, Burbank offered two 30-minute weekly sessions of speech therapy, one individual and one pull-out.

The Boone Fetter Clinic June 2017 assessment, of which Burbank was aware at the time of its February 2018 assessment, had recommended two hours per week of speech therapy. Ms. Riven was either unaware at the time of her February 2018 assessment, or could not at, hearing, recall what level of speech and language services Student had been receiving from his then-current providers. Although unknown to Burbank at the time, Ms. Gross at UCLA determined in late February or early March 2018 to provide

three individual 30-minute speech sessions to Student. This was also the amount that, at hearing, Ms. Phillips established she was providing to Student when she first began serving him in June 2018, and throughout the time he received services from her.

At hearing, Ms. Riven was unable to provide a convincing explanation of why two 30-minute sessions was the appropriate intervention, other than to generically state that the recommendation was "based on his needs." The Supreme Court in *Andrew F.* stated that school districts must "offer a cogent and responsive explanation for their decisions." (*Andrew F., supra* at pp. 1000-1001.) Burbank failed to do so here.

Ms. Riven explained that she recommended the group speech therapy sessions to work on Student's social communication, to try to get him to learn from other children, and to develop the awareness of others in the first instance. She felt even though he was nonverbal at that time, he could use gestures, such as handing preferred items to others.

Student's private speech and language pathologist Ms. Phillips opined at hearing that the level of services Burbank offered in March 2018 would have been insufficient when she first met Student in May 2018. Also, she believed group speech therapy was not appropriate for Student because he did not yet have the attention or the language to benefit from it. She did not work with him in small groups, only individually.

As Ms. Phillips opined, 30 minutes was the limit of a young student's level of attention, therefore the 30-minute duration of the offered services was appropriate. However, the evidence overall, including the recommendations of other assessors and professionals who worked with Student, established that three individual sessions a week were appropriate for Student given his nonverbal status and severe deficits. Burbank denied Student a FAPE by offering too few sessions, and by offering group instead of individual sessions. Student prevails on Issues 5.a.iii.(1), 5.b.iii.(1), and 5.c.iii(1).

Related Services in Occupational Therapy

The March 2018 IEP offered 60 minutes per week of occupational therapy, one 30-minute session a week individual pull-out, and one 30-minute session per week described as push-in classroom collaboration. The pull-out individual session would have been in a clinic setting at Horace Mann.

Although unknown to Burbank at the time, UCLA's Ms. Saccacio also recommended one hour per week of clinic-based occupational therapy. She did not specify whether the clinic sessions should be individual or group. Also, at hearing, she testified that two 30-minute sessions might be as effective as one sixty-minute session.

Ms. Anderson opined at hearing that UCLA's recommendation of one 60-minute session was inappropriate, due to Student's short attention span. She preferred to break the sessions up. Also, she did not want Student to miss a full hour of class. Overall, Ms. Anderson credibly defended Burbank's offer as appropriate, persuasively opining that the collaborative setting in a group session with other children would have assisted in socialization, and in the generalization of sensory strategies. Nevertheless, in the June 2018 IEP, the offer was changed in a spirit of compromise with Parents to encourage Student to attend Burbank's program, to specify individual, rather than group, services.

Student did not establish the offers of occupational therapy services denied FAPE. Burbank prevails on Issues 5.a.iii.(2), 5.b.iii.(2), and 5.c.iii.(2).

Related Services in Applied Behavior Analysis Including a One-to-One Aide for the Full School Day and Direct One-to-One Intervention Outside the School Day for 30 Hours Per Week

Student contends that he required applied behavior analysis one-to-one support for the full school day and outside the school day, for 30 hours per week. Student contends the March and June 2018 and the January 2019 IEPs denied him a FAPE by failing to provide these services. Burbank contends its offer of a secure facility with a

structured program and high ratio of adults to children in the SEED program offered Student a FAPE without full time one-to-one aide services.

As early as Mother's November 2017 initial correspondence and questionnaire, Burbank was on notice of Mother's concerns for Student's behavior and safety. She reported in her initial correspondence and questionnaire responses that Student did not have any awareness of danger and might run into oncoming traffic. B.I.G.'s January 2018 progress report noted he put inedible objects into his mouth. Mother reiterated her concerns to the assessors on February 20, 2018. Thus, by the March 2018 IEP, Burbank was aware of Mother's concerns about Student's safety due to his of unawareness of danger, possible bolting or elopement, and mouthing of non-food items. Burbank concluded Student's behaviors did not rise to the level that impeded Student's learning or the learning of others. Ms. Chaja and Ms. Ramallo made clear Burbank's opinion that more interfering behaviors would have been necessary for them to consider full time "special circumstances instructional assistant" aide services. Ms. Chaja described profanity and aggression as possible justifications, in addition to safety. Ms. Ramallo described health concerns or procedures as another justification. Burbank treaded this line in the March 2018 IEP by not by offering full time aide support but by offering a closed, secured, locked facility, with 30 minutes four times a week out of a two-and-a-half-hour day of one-to-one support, and the provision of closer supervision during unstructured time.

The evidence concerning Student's need for a one-to-one aide was close, and closely tied to the parties' contentions regarding general education, which are discussed in the next section. Student's contention that he required one-to-one aide services was inextricably tied into his other contention that he should be in a general education placement. B.I.G.'s January 2018 progress report, which was in Burbank's possession in March 2018, showed that Student was not exhibiting extreme or maladaptive behaviors,

and had improved since January 2018. And, Ms. McNulty described Student as “compliant.” Any safety concerns might have been appropriately addressed by a closely supervised program. The UCLA program, like SEED, was closely supervised and it also did not provide Student with a one-to-one aide. Based on UCLA’s example, the evidence was convincing that depending on the nature of the program otherwise provided, full time one-to-one aide support might not have been needed. While Student would have required one-to-one aide support in general education, this Decision finds that general education was not the least restrictive environment for Student. Therefore, Student’s claim that he needed one-to-one aide support because he also needed to be in general education fails.

Student had serious challenges that could have been addressed as either behavioral or academic in nature. B.I.G.’s 27 goals addressed Student’s short attention span, inability to engage, lack of language, and other serious educational challenges, phrased as behavior goals, that were academic and pre-academic. Student lacked skills that were the foundation of learning, such as sitting still, making eye contact, tracking objects visually, imitating, matching of objects, shapes, colors, labelling people and things, following instructions, and communicating with words and gestures. Burbank treated these challenges as educational rather than behavioral, and considered that they would be addressed in the classroom itself. Burbank contemplated that its teachers could guide Student in the preschool setting, and that Student’s natural progression should encompass generalizing “behavioral” skills such as sitting, attending, engaging, making eye contact, and imitating into pre-academic skills. Thus, Student’s challenges fell within a grey area that might have been addressed either as behaviors or simply as learning itself. Student failed to meet his burden of proof to establish that these challenges were appropriately addressed by full time one-to-one aide services, rather than by appropriate specialized academic instruction. And, Student’s evidence did not

establish that he needed one-to-one aide services outside the general education setting. Thus, Burbank prevailed on Student's Issues 5.a.iii.(3), 5.b.iii.(3), and 5.c.iii.(3).

STUDENT'S ISSUES CONCERNING GENERAL EDUCATION PLACEMENT

Student contends Burbank denied him a FAPE by failing to offer placement in a typical general education preschool setting with a small class size, small student-to-teacher ratio, structured educational programming, and typically developing peer role models. Student contends the least restrictive environment for him was a typical general education preschool classroom with a full time one-to-one aide. Burbank contends a special day class, such as SEED, was the least restrictive environment for Student.

For the period between three and six years of age, California does not mandate compulsory education for typically developing children. (Ed. Code, § 48200.) However, if a preschool-aged child requires special education and related services in order to receive a FAPE, school districts must offer the child an appropriate program. (Ed. Code, § 56345, subd. (a)(1)(B), 56440 -56447.1.) Under the IDEA and California special education law, school districts must offer an IEP to children with disabilities who turn three years of age. (20 U.S.C. §1412(a)(1)(A); 34 C.F.R. § 300.101(a); Ed. Code, §§ 56001, subd. (b), 56026, subd. (c)(2).)

School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii).) The term "supplementary aids and services" means aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with non-disabled children to the

maximum extent appropriate in accordance with the least restrictive environment mandate. (20 U.S.C. § 1401(33).)

School districts, as part of a special education local plan area, must have available a continuum of program options to meet the needs of individuals with exceptional needs for special education and related services as required by the IDEA and related federal regulations. (34 C.F.R. § 300.115; Ed. Code, § 56360.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; non-public, non-sectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication, instruction in the home, or instruction in hospitals or institutions. (34 C.F.R. § 300.115; Ed. Code, § 56361.)

In *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404, the court established a four-part test that provides guidance on the question of whether a placement is in the least restrictive environment. The four factors are:

1. the educational benefits of placement full time in a regular class;
2. the non-academic benefits of such placement;
3. the effect the child will have on the teacher and children in the regular class;
- and
4. the costs of mainstreaming the student.

(*Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Da iel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School District No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the least

restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].) Whether education in the regular classroom, with supplemental aids and services, can be achieved satisfactorily is an individualized, fact-specific inquiry. (*Daniel R.R. v. State Board of Educ., supra*, 874 F.2d at p. 1048.) If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.)

Daniel R.R. v. State Board of Ed., supra, 874 F.2d at p. 1044-45, points out that a tension exists between the statutory preference for mainstreaming and the equally important mandate to individually tailor each child's IEP to his or her special needs. Regular classes do not always provide the best individual program for each child. When education in the regular classroom cannot meet the child's needs, the presumption in favor of mainstreaming is overcome. Likewise, a school district need not provide every conceivable supplementary aid or service, nor devote all or most of their time to one child, nor act as a special education teacher within a general education classroom. (*Id.* at p. 1048-49.)

Student did not establish the educational benefits of placement in a regular education preschool classroom as of the March 2018 and later IEPs. When first assessed, Student was unable to follow one-step directions. Student's expressive and receptive language skills were at the level of under 12 months, according to the speech and language assessment performed at UCLA in February 2018. Student's attention span was approximately 20 seconds. Despite the optimistic reports generated by Disney, it did not appear that Student was obtaining direct instruction from the Disney teachers, who relied on his one-to-one aide to prompt his responses. All the individual attention to

Student was provided at Disney by his one-to-one aide.

Burbank witnesses were better qualified and more credible to opine on this topic than the Disney teachers, who evidenced little if any familiarity with Student's individual needs for specialized academic instruction. The opinions of Burbank's Ms. Chaja regarding the inappropriateness of general education for Student were more credible than Disney's Ms. McNulty's beliefs, which although sincere, were not persuasive. Ms. McNulty, despite her long teaching career, had virtually no experience teaching children with special needs. She had only worked with nine or 10 autistic children over the entirety of her career in the preschool classes. She had no specific training in educating children with autism, except some classes in college and graduate school. She had no training in applied behavior analysis.

The most convincing evidence of what was appropriate for Student came from UCLA's thorough assessments, programming, and recommendations, as confirmed by the expert testimony of Ms. Paparella. The UCLA program implemented consistent structure with facilitation by adults, with prompting and assistance to encourage Student to develop his social relatedness and engagement with adults, objects, peers, and groups. This level of structure and assistance, which was appropriate for him at the time, could not be expected in the general education setting. A general education classroom would not provide the structured daily schedule, small class size, high staff-to-student ratio, individualized programming, and behavioral support to target core deficits characteristic of autism. Disney was at the opposite end of the continuum from UCLA. UCLA structured and facilitated every aspect of Student's day including greetings and farewells, eye contact, and all adult and peer interactions.

Therefore, as of the time frame of the March 2018 IEP, Student did not establish the educational benefits of placement full time in a regular class, the first *Rachel H.* factor.

Student also did not establish that the non-academic benefits to him of a general education kindergarten placement would outweigh those of the special day class. At Disney, Student existed largely in isolation from his peers, tolerating them but engaging only in parallel play. No evidence was presented to indicate that the social benefits he did exhibit at Disney, such as tolerating others, engaging in parallel play, joining a group activity with prompting, and starting to learn to share with prompting, were restricted to the general education setting, or could not be equally achieved in a special day class. This would especially be true if he were offered appropriate mainstreaming opportunities. To the contrary, the need in general education of continual prompting by an aide might have isolated him from his peers, while a special day class placement might allow Student to actually interact with his peers during academic instruction. As Burbank opined in the June 2018 IEP, a one-to-one aide can be considered even more restrictive than a setting in which a student might be able to function more independently. Thus, Student did not meet his burden of showing that there were non-academic benefits to Student from placement in general education, the second *Rachel H.* factor.

No evidence was presented regarding the third *Rachel H.* factor, classroom impact, thus it does not shift the weight of the evidence here. However, if Student had been placed within a general education classroom, he would have been largely segregated with his aide and would have required a substantially modified and entirely separate program. This would have a negative effect on the classroom, and take up the general education teacher's time to the detriment of other children. The normal teacher-to-student ratio in the Disney preschool setting was insufficient to address Student's needs. Student did not establish the third *Rachel H.* factor.

The cost of the proposed one-to-one aide, the fourth *Rachel H.* factor, also militates against Parents' preferred general education placement.

The same analysis holds true after March 2018, for the June 2018 and January 2019 IEPs. Mother's April 17, 2018 letter implicitly militates against general education. She rejected the SEED program she observed because she felt the functional level of the children observed in the classroom was significantly more advanced than Student. Although she stated she understood the concept of Student learning from more advanced children, she believed there was a large learning gap between these children and Student, and he would not have been able to keep up or make progress in the special education classroom. This observation holds even truer if Student were placed in general education.

Equally convincing and persuasive were UCLA's recommendations for educational programming for the time period immediately following Student's exit from their program. UCLA recommended a developmentally appropriate and structured intervention program every day, including a classroom with a structured daily schedule, small class size, high staff-to-student ratio, individualized programming and behavioral support to target core deficits in autism, and develop pre-learning skills. Ms. Paparella's testimony established that UCLA only noted in its report, but did not necessarily recommend, that Student would return to Disney.

Student's improvements in his levels of functioning from March onward, after UCLA, did not alter the impropriety of a general education placement as of the June and January IEPs. In Ms. McNulty's class after UCLA, at the time of the June IEP, Student was engaging more with others but it was still always facilitated and not independent. As late as the time of hearing, according to Ms. Gallardo, he sat with his peers and asked peers to share toys with him but not by his own choice. His social interactions were encouraged and facilitated by Ms. Gallardo and Student's aide. Student's social interactions were, as Ms. Gallardo testified, "more us doing the encouraging." Despite academic successes, such as learning his letters and numbers, and his progress with Ms.

Phillips, and the accomplishments in Student's development, Student failed to establish the propriety of the general education setting with full time support as the least restrictive environment for him. The determination of whether education in the regular classroom, with supplemental aids and services, can be achieved satisfactorily is an individualized, fact-specific inquiry. Here, the evidence established that receiving instruction in the general education class would, contrary to Mother's impression, isolate Student and would not be reasonably calculated to allow him to receive educational benefit. Student did not meet the burden of showing that general education was appropriate. In conclusion, Student failed to carry his burden of proof. Burbank prevails on Issues 5.a.iv., 5.b.iv., and 5.c.iv.

STUDENT'S ISSUES CONCERNING EXTENDED SCHOOL YEAR

Student contends Burbank denied him a FAPE by failing to offer, for extended school year, placement in a typical general education preschool setting with related services in speech and language, occupational therapy, and applied behavior analysis consisting of a one-to-one aide for the full school day and direct one-to-one intervention outside the school day for 30 hours per week for the extended school year and continuing weeks of service without breaks to prevent regression. Burbank contends its offers provided Student a FAPE.

Each public agency must ensure that extended school year services are available as necessary to provide FAPE. (34 C.F.R. § 300.106 (a).) In implementing the requirements of this section, a public agency may not unilaterally limit the type, amount, or duration of those services. (*Ibid.*)

Each of the elements of this claim have been addressed elsewhere in this Decision. Student was not denied a FAPE by Burbank's failure to offer extended school year placement in a typical general education preschool setting with applied behavior analysis consisting of a one-to-one aide for the full school day and direct one-to-one

intervention outside the school day for 30 hours per week. However, the duration of the program and related services for extended school year were predetermined and not individualized. Based on the UCLA report that continuing services to prevent regression were "critical," and Burbank's lack of consideration of individualization of its offer, Burbank's extended school year offers denied Student a FAPE. Student prevails on Issues 5.a.v., 5.b.v., and 5.c.v.

BURBANK'S ISSUE: FEBRUARY 2019 IEP

Burbank contends that its February 14, 2019 IEP offered Student a free appropriate public education, with the exception of physical therapy which is not in dispute. Student disagrees for all the same reasons that Student contests the 2018 and January 2019 IEPs.

There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. 176, 206-7.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

Procedurally, the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) The IEP must state the child's present levels of academic achievement and functional performance, and measurable annual goals. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320.) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start

date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code § 56345, subd. (a)(7).) In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a).)

Burbank's February 2019 IEP complied with many procedural requirements. Parents were afforded the opportunity to participate, and did meaningfully participate. The IEP contained all required content. The IEP team considered Student's strengths, Parents' concerns, and the academic, developmental, and functional needs of the child.

However, as with the January 2019 IEP, and for all the same reasons stated above, Burbank never considered the UCLA discharge report. Also, the offer of extended school year was not individualized and was predetermined. Nor did Burbank add a behavior goal or behavior support plan, nor increase the level of speech therapy services offered.

Most importantly, the offer continued to be vague. In fact, the addition of up to four hours of mainstreaming made it even more vague than before. Whereas the timing and specifics of the reverse mainstreaming had been unclear, the addition of four hours in general education made clarity even more important. Without knowing whether Student's special day class would be in the morning or afternoon, it was impossible to know the parameters of his mainstreaming opportunities, because the general education preschool program ended at 12:30 PM. And, while a one-to-one aide was offered for two hours, this would not have covered the full four hours of mainstreaming. Although Student might not have required one-to-one aide services in a secure facility, it is indisputable that he would have needed this related service while being mainstreamed.

Burbank did not prove the SEED placement and related services that it offered at the February 2019 IEP offered Student a FAPE in the least restrictive environment. As the petitioning party, Burbank had the burden of proof on this issue. (*Schaffer v. Weast, supra*, 546 U.S. 49, 56-62.) Student prevails on Issue 6.

REMEDIES

Student prevailed on the Issues listed below, which entitles him to remedies for those claims.

ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Education* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup School District*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496.) In remedying a denial of a FAPE, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, 471 U.S. at p. 374.)

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d at p. 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C.Cir. 2005) 401 F.3d 516, 524.)

Parents may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *Burlington, supra*, 471 U.S. at pp. 369-370 [reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE].) The private school

placement need not meet the state education standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School District Four v. Carter* (1993) 510 U.S. 7, pp. 11, 14 [114 S.Ct. 361, 126 L.Ed.2d 284] [despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress].)

Since Burbank did not offer Student FAPE, Student is entitled to reimbursement for his private school placement and services actually paid by Parents from his third birthday until the date of this Decision. Student established that he made progress at Disney, which although it did not provide a FAPE in the least restrictive environment, was sufficiently appropriate for purposes of reimbursement. Since Burbank did not offer Student appropriate speech therapy, Student is also entitled to reimbursement for his private speech therapy services. Student is further entitled to transportation at the Internal Revenue Service rates for the years 2018 and 2019 for round trip travel to and from that placement and those services. Student is further entitled to \$187.00 for B.I.G.'s services on January 2 through 4, 2019, that was not borne by Parents' insurance.

The detailed calculation of reimbursement is as follows:

For B.I.G.:

- \$187.00

For Disney:

- \$15,622.00: for the period June 11, 2018, to May 10, 2019;
- \$3,586.00: \$326 per week for the 11 weeks from May 13 through July 26, 2019, the date of this Decision;
- \$497.85: for 2018 mileage to Disney for the 29 weeks from June 11, 2018, to

December 31, 2018, at the 2018 Internal Revenue Service rate of 54.5 cents per mile, calculated at 9 miles for two days each week and 4.5 miles for three days each week; and

- \$548.10: for 2019 mileage to Disney for the 30 weeks from January 1, 2019, to the date of this Decision at the 2019 Internal Revenue Service rate of 58 cents per mile, calculated at 9 miles for two days each week and 4.5 miles for three days each week.

For Ms. Phillips:

- \$10,170.00: for the period from inception of her services until April 2019;
- \$3,510.00: three sessions a week at \$90.00 per session for the 13 weeks from May 2019 through the date of this Decision;
- \$1,327.62: 2018 mileage to Ms. Phillips for the 29 weeks from June 11, 2018, to December 31, 2018, at the 2018 Internal Revenue Service rate of 54.5 cents per mile, calculated at 28 miles for three days each week; and
- \$1,461.60: 2019 mileage to Ms. Phillips for the 30 weeks from January 1, 2019, to the date of this Decision at the 2019 Internal Revenue Service rate of 58 cents per mile, calculated at 28 miles for three days each week.

The total is \$36,910.17.

Since Burbank did not consider the results of outside assessments, or offer appropriate goals, behavior support plan, speech therapy services, individualized extended school year duration, and behavior support during mainstreaming, Burbank shall hold an IEP team meeting within 60 days of this Decision. The following shall be addressed at the IEP team meeting: the UCLA discharge report in its entirety including the proposed placement, services, and goals. Burbank shall consider Student's individualized needs in the duration of extended school year. Burbank shall consider Student's needs with regard to behavior goals and a behavior support plan. To the

extent Student will be offered general education mainstreaming, Burbank will consider his needs with regard to one-to-one aide services for the entire time he is mainstreamed.

ORDER

1. Within 60 calendar days of this Decision, Burbank shall hold an IEP team meeting. The IEP team meeting shall be conducted in such a way as to meet all legal requirements.
2. Within 60 days of the date of this Decision, Burbank shall reimburse Parents \$36,910.17.
3. The parties' remaining requests for relief are denied.

PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. In accordance with that section, the following finding is made:

Student prevailed on Issues 3.a.i.(3)b., 3.a.ii, 3.b.i.(3)b., 3.b.ii., 3.c.i.(2), 3.c.i.(3)b., 3.c.ii., 5.a.i., 5.a.ii., 5.a.iii.(1), 5.a.v., 5.b.i., 5.b.ii., 5.b.iii(1), 5.b.v., 5.c.i., 5.c.ii., 5.c.iii.(1), 5.c.v., and 6.

Burbank prevailed on Issues 1, 2, 3.a.i.(1), 3.a.i.(2), 3.a.i.(3)a., 3.a.i.(4)a., 3.a.i.(4)b., 3.a.i.(5), 3.a.i.(6), 3.a.i.(7), 3.b.i.(1), 3.b.i.(2), 3.b.i.(3)a., 3.b.i.(4)a., 3.b.i.(4)b., 3.b.i.(5), 3.b.i.(6), 3.b.i.(7), 3.c.i.(1), 3.c.i.(3)a., 3.c.i.(4)a., 3.c.i.(4)b., 3.c.i.(5), 3.c.i.(6), 3.c.i.(7), 4, 5.a.iii.(2), 5.a.iii.(3), 5.a.iv., 5.b.iii.(2), 5.b.iii.(3), 5.b.iv., 5.c.iii.(2), 5.c.iii.(3), and 5.c.iv.

RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to

a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: July 26, 2019

/S/

June Lehrman

Administrative Law Judge

Office of Administrative Hearing